IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO 438 OF 2020

BETWEEN

ARAFAT BENJAMIN MBILIKILA ..... APPLICANT

VERSUS

NMB BANK PLC ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The relationship between the parties abovementioned commenced on the 02nd of January, 2019 when the respondent (the employer) employed the applicant herein (the employee) in a capacity of a Senior Manager. The relationship was terminated on the 15th day of May, 2019 for reasons of gross misconduct on the part of the applicant. The applicant was aggrieved by the said termination but for some reasons which did not impress the Commission for Mediation and Arbitration (CMA), the applicant delayed in filing a labor dispute at the CMA. He then had to lodge an application for condonation to refer a labor dispute to the CMA out of time. The application was lodged under Rules 29(1)(a),(2),(3) (a)-(g), 4(a)-(e) and 11(1)-(4) of the Labor Institutions (Mediation and Arbitration) Rules G.N. No. 64 of 2007. The CMA was not convinced of his reasons for the delay and eventually dismissed the application for want of good cause.

Aggrieved, the applicant has preferred this Revision Application initiated by a Notice of application and a Chamber Summons supported by an affidavit of the Applicant Arafat Benjamin Mbilikila dated 23rd October, 2020. In both his Notice of Application and the Chamber Summons, the applicant is moving the Court for the following orders:

1. That this Honorable Court be pleased to examine, revise, quash and set aside the ruling of the CMA in dispute No. CMA/DSM/ILA/739/2019 dated 21/08/2020.
2. Direct the CMA to extend time and proceed to determine the complaint on merit and,
3. Grant any other such belief and order as the Court my deem fit and proper to grant.

Along with their notice of opposition, the respondent filed along with it a notice of preliminary objection on point of law that:

(i) The Court has been wrongly moved to entertain the present application.

(ii) That the application is bad in law for seeking orders of revising a CMA award while on the face of record there is no award.

On the 20th July, 2021 I ordered the hearing of both the preliminary objection and the main application to proceed concurrently by way of written submissions. Both parties adhered to the schedule of submissions, the applicant's submissions were drawn and filed by Mr. John Seka, learned advocate while the respondent's submissions were drawn and filed by Mr. Sabas Shayo, learned advocate. In this Judgment I will start with

determination of the preliminary objection, in case they are overruled, then I will proceed to determine the substance of the application.

On the first ground of objection that the Court has been wrongly moved to entertain the present application, Mr. Shayo submitted that the applicant has failed to properly move this Court to entertain the present application because he did not file CMA Form. 10, a Notice of intention to seek Revision prior to lodging this application. He argued that this is contravention of Regulation 34 of the Employment and Labor Relations (General) Regulations, 2017. That the statute has used the words shall which under Section 53(2) of the Interpretation of Laws Act Cap 1 R.E 2019 which provides that:

> *"Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."*

He then submitted that in view of the above provision, it is clear that from 24th February, 2021, all parties moving this Court to try an application for Revision are duty bound to file CMA Form. 10 before filing an application for revision to this Court. That in this application, the applicant herein did not do so.

Mr. Shayo admitted that there is yet no precedent from this Court on the effect of a party who fails to file a notice of Revision as a condition precedent to filing an application for revision. He was then quick to point out that this Court takes an inspiration from the effect of failure to file Notice of appeal to appeal to the Court of Appeal in the normal civil

practice whereas the position of the Court of appeal in a chain of authorities is that the same is fatal making the appeal incompetent.

In reply, Mr. Seka did not have much to submit, he first argued that the PO's raised and argued by this written submissions do not qualify to be PO's for being vague. He supported his submissions by citing the decision of the Court of Appeal in the case of **James Burchard Rugemalira Vs. The Republic and Another, Criminal Application No. 59/19/ of 2017** (unreported) and that of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969]**. He then argued that it is now settled law and there exists plethora of authorities without number that have accepted that Mukisa Biscuits case is authoritative that any Preliminary Objection requiring proof of facts by a long drawn process of soliciting evidence will be rejected. He continued to submit that having read the filed submissions by the Respondent, the raised Preliminary Objections are vague and as such it complicates their response.

Attacking the first line of Objection, Mr. Seka submitted that the Respondent has not cited the specific Section alleged to have been breached. That the whole submission reveals that the Respondent has cited The Employment and Labour Relations [General] Regulations 2017 as the law that has been breached arguing that this citation is so vague to solicit a reasoned response because the cited regulation has so many specific provisions.

In rejoinder, Mr. Shayo started by distinguishing the cited case of **James Richard Rugemalira** (Supra), apart from pointing out that the unreported case cited was not attached to the submissions asking the court

to disregard it, he also urged the court to distinguish it because it is not applicable in our case. He submitted that the principle in the above case cannot be applied in the present case because reading between the lines in the said decision, one will discover that the same was based on the amendment of The Court of Appeal Rules in 2017 (G.N. No. 362 of2017) which the applicant escaped to speak of. That since this Court is governed by its own Rules then the said case is distinguishable.

He submitted further that Mr. Seka has also misconstrued the applicability of the principle enunciated in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** because in the present case, the notice of preliminary objections do not in any way require evidence. He elaborated that the first preliminary objection is based on the provisions of The Employment and Labour Relations (General) Regulations, 2017 which is a pure point of law and does not need anything to substantiate other that the cited law.

On the argument that since the rules of this Court do not mention that a notice of Revision is a mandatory document accompanying an application for Revision then our preliminary objection lacks basis; Mr. Shayo replied that Mr. Seka has misconstrued his arguments in chief. That he did not say that CMA Form No.10 must accompany an application for Revision, but that CMA Form No.10 simply needs to be filed at the CMA before one prefers an application for Revision as a condition prior to instituting an application for Revision. That since the respondent has never been served with CMA Form No.10 and neither has the applicant argued that the same was filed at The CMA, which would enable this Court to

satisfy itself whether the applicant is really complied with the said legal requirement by simply perusing the CMA file availed with to the Court, then the applicant defaulted this mandatory requirement.

On the argument that if it was a mandatory requirement then the Rules could have stated so, Mr. Shayo replied that the Labour Court Rules started to be applied in 2007 but The Employment and Labour Relations (General) Regulations, 2017 started to be applied in on 24th February 2017 when they were gazzeted therefore the same cannot be found in the Labour Court Rules. That the Regulations are applicable in view of Rule 34 of The Employment and Labour Relations (General) Regulations, 2017.

On the argument that the Employment and Labour Relations (General) Regulations, 2017 were gazzeted on 24th February 2021 then they don't apply in their case, his reply was that the said Rules were gazzeted on 24th February 2017 and the reference to them as gazzeted in 2021 was a mere typographical error which can be cured by the slip of the pen rule as per the case of **Attorney General Vs. Lohay Akonaay And Joseph Lohay [1995] TLR 80** cited by the applicant in his submission. His prayer was that the application is struck out.

Having heard the rival submissions by the parties, I will begin with Mr. Seka's argument that the objection raised does not qualify to be argued as a preliminary point of objection because it entails a lengthy arguments and evidence. Mr. Shayo's reply is that the objection is based on the provisions of the Regulations which is a pure point of law and does not need anything to substantiate other that the cited law. That the

respondent has never been served with CMA Form No.10 and neither has the applicant argued that the same was filed at the CMA, which would enable this Court to satisfy itself whether the applicant is really complied with the said legal requirement by simply perusing the CMA file, availed with to the Court.

I am in agreement with the argument by Mr. Shayo that the point can be argued as a preliminary point because it is actually a point of law. I base my view in the finding of the Court of Appeal in the case of **CM-CGM Tanzania Ltd vs Justine Baruti (Civil Appeal No.23 of 2020) [2021] TZCA 256; (15 June 2021)** while faced with the same issue of whether the High Court by not addressing itself on the issue whether the CMA Form No. 1 initiated the dispute at the CMA was a point of law or not, the Court of Appeal had this to say:

> *"Beginning with the first ground, we think that its gravamen is clearly jurisdictional. We are persuaded by Dr. Kapinga that this ground* ***raises a point of law as it faults the learned High Court Judge for not addressing her mind to the issue whether the Referral Form CMA FI was filed in accordance with section 86 (1) and (2) of the ELRA requiring a party referring a dispute to the CMA to satisfy the CMA that a copy of the referral has been served on the other parties to the dispute.*** *Evidently, the said ground had its origin from the CMA's ruling shown at pages 205 to 207 of the record of appeal dismissing the appellant's preliminary objection to the competence of the referral. In our view, the determination of this ground would*

entail interpretation of section 86 (1) and (2) of the ELRA as well as its application to the facts of the case on the question whether the referral form was duly filed and served."

On the same principle, I find the question to be determined by this court, is whether the Revision at hand was initiated by CMA Form No. 10 which is required under Section 34(1) of the Regulations. Since it has not been established that the said form was or was not filed at the CMA, the presumption is that it was not filed and the follow up issue is whether the omission to do so is fatally defective to make the application incompetent. There is no need of evidence to be adduced since if the form was filed, we would not have had these lengthy arguments.

Having said that, I will now move to determine the objection. The Regulations that is a subject of the objection is made under Section 98(1) of the ELRA. The Section provides:

98.-(1) The Minister may, in consultation with the Council, make regulations and prescribe forms for the purpose of carrying out or giving effect to the principles and provisions of this Act.

With respect to the argument raised by Mr. Seka, the Regulations in question have their basis under the cited provision of the ELRA. Turning to the specific provision in dispute, the Regulation 34(1) provides:

"The forms set out in the Third Schedule to these Regulations ***shall be used in all matters*** *to which they refer."*

In simple interpretation, the Regulation requires that in order to make or initiate any application under the Regulations or any other law in relation in matters where there are special forms provided for, those forms

shall be used in the matters they refer to. For instance, a dispute is referred to the CMA by the CMA Form No. 1 made under Regulation 34(1) of the Regulations; it makes it mandatory such that in any case that the Form No. 1 is missing in the records, the Court of Appeal struck out the appeal. (see the holding in the cited case of **CM-CGM Tanzania Ltd** above).

As far as the records are and taking from the submissions of Mr. Seka, it has not been disputed that the said Form No. CMA F.10 was not lodged at the CMA prior to the filing of this revision application. Since the word "shall" has been used in the Regulation that created the Forms, the omission to do so is a fatal defect that cannot be cured by a simple argument. Owing to that I find the application before me to be fatally defective for failing to comply with the mandatory provisions of the Regulation 34(1) of the Regulation and consequently, the application is hereby struck out.

Dated at Dar-es-salaam this 13th day of September, 2021

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S.M. MAGHIMBI
JUDGE