IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 948 OF 2019

BETWEEN

THE INSTITUTE OF FINANCE MANAGEMENT ..... APPLICANT

VERSUS

SALUM RAMADHANI AND 9 OTHERS ..... RESPONDENTS

JUDGMENT

S.M. MAGHIMBI, J:

The present application emanates from a refusal to set aside an ex-parte award of the Commission for Mediation and Arbitration ("CMA") in Labor Dispute No. CMA/DSM/ILA/R.1200/16/139 ("The Dispute"). In the said dispute, the 9 respondents herein where successful complainants following a complaint of unfair termination by the applicant herein. The dispute at the CMA was determined ex-parte after the applicant herein defaulted appearances without notice. Subsequent to the ex-parte award, the applicant unsuccessfully lodged an application to set it aside whereby the CMA was not satisfied with the reasons adduced by the applicant for non-appearance and eventually dismissed the said application. Dissatisfied by the dismissal of the application, the applicant has lodged the current Revision raising the following legal issues:

1. Whether the Applicant's failure to appear before the CMA in labour Dispute No. CMA/DSM/ILA/R.1200/16/139 was justified in law;
2. Whether the Applicant had valid reasons for his failure to appear at the CMA in Labour Dispute No. CMA/DSM/ILA/R.1200/16/139;
3. Whether the CMA had justifiable reasons to proceed exparte in labour dispute No. CMA/DSM/ILA/R.1200/16/139 without taking into consideration that the Applicant is a Public Institution whose labour dispute has a well set forum to be followed first;
4. Whether the Applicant had no valid reasons to have the exparte award be set aside through reference number CMA/DSM/KIN/ R.200/16/139;
5. Whether the Respondents successfully proved their employment relationship with the Applicant;

The application was lodged by both notice of application and a Chamber Summons under Section 91(1)(a) and 91(2)(b), 91(2)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act, 2004; Rules 24(1), 24(2)(a),(b),(c),(d),(e),(f), and 24(3)(a),(b),(c),(d), 28(1)(a) 28(1)(c), 28(1)(d), 28(1)(e) of the Labour Court rules, 2007, Government Notice No. 106 of 2007). The Chamber Summons was supported by an affidavit of Hassan Hatibu Semkiwa, the Director of Human Resources and Administration of the Applicant; dated 18th day of December, 2019. In her Chamber Summons, the applicant moved the court for the following:

1. The Honorable Court be pleased to call for and examine the record of the proceedings and ruling of the Commission for Mediation and Arbitration at Kinondoni, Dar es Salaam (Hon. ALFRED MASSAY) dated 3rd day of April, 2018 in Labour Dispute No.

CMA/DSM/KIN/R.200/16/139 for purposes of satisfying itself as to the legality and propriety, revise the same and set aside or quash the said ruling.

2. Costs of this application.
3. Any other relief(s) this Honourable Court may deem fit and just to grant.

On their part, the respondents, duly represented by Mr. Yahya Njama learned Advocate, and other advocate under YMN Law Office, strongly opposed the application by filing a notice of opposition under Rule 24(4) (a)&(b) of the Rules, arguing that the applicant miserably failed to account for the failure to appear when the main dispute was set for hearing. The respondents prayed for the dismissal of this application.

When the application came for hearing on the 05th day of August, 2021, Mr. James Evarist, learned advocate represented the applicant while Mr. Mohamed Shabani, learned advocate, represented the respondents. I appreciate their rival submissions which will be considered on board in due of constructing this judgment. But before I proceed to determine the merits of otherwise of this application, I must point out that in determining this revision, I will not determine the 5th ground on whether the applicant proved their employment at the CMA. This is because proof of employment is a matter of evidence to be adduced and determined by a court with original jurisdiction. My determination of whether or not the same was proved will have to include re-analysis of the evidence that was adduced at the CMA. At this point, I have no jurisdiction to venture into that evidence because the issue of proof of evidence is an issue of Revision of the merits

or otherwise of the Dispute, something which is not what the applicants have moved the court to do. I was just moved to determine whether the applicant had justifiable reasons for non-appearance at the tribunal to warrant setting aside the ex-parte award.

That said, I will now go back to the merits of the application before me. In determining them, I will cluster the remaining issues for determination into two. One is whether, at the CMA, the applicants adduced sufficient reasons for the non-appearance leading the matter to be determined ex-parte. Two is what I have found to be raised by the applicant as an issue of law, that the dispute was pre-maturely referred to the tribunal before the respondents exhausted the available remedies under the Public Service Act, No. 8 of 2002 as amended in 2016 which introduced the Section 32A that is the basis of the argument.

At the onset of his submissions, Mr. Evarist prayed to adopt the affidavit in support of the application to form part of his submissions. On whether the applicant adduced sufficient reason for non-appearance to warrant issuing an order to set aside ex-parte decree, Mr. Evarist submitted that failure of the applicant's representative to appear at the CMA was not intentional and it had no bad motive to delay the matter. That the failure was caused by the respondents themselves who had engaged their representative and he was making a follow up with the applicant. While the applicant was still negotiating with the representatives to know the issue, the respondents proceeded ex-parte without the knowledge of the applicant and that they had not informed the applicant that they had withdrawn their instructions of their representatives. He hence argued that the non-appearance was

because the applicant thought their issues will be resolved by way of negotiations through their representative.

On the second issue that the respondents didn't exhaust the available remedies, Mr. Evarist submitted that the applicant is a public institutions whose employment is, amongst other laws, sanctioned by the Public Service Act, No. 8 of 2002 as amended in 2016 ("The Act") which introduced the Section 32A. That the new Section requires a public servant, prior to seeking remedy provided for in the labor laws, to exhaust all remedies provided for under the Act which are provided under Section 25. The Section requires a public servant who is not satisfied with termination of his/her employment from a public institution to refer the matter to the Public Service Commission.

He argued that based on that fact, before the proceeding ex-parte, the CMA was supposed to satisfy itself that the applicants who are respondents herein, had followed the provisions of the Act. Further that the CMA should not have entertained the matter and instead, they should have been advised to follow the Act and thereafter follow procedures to refer the matter to the CMA or any other relevant tribunal. He concluded that since that fact was not decided by the CMA, it need not be ignored because if it is ignore, fairness will not be done to both parties. He hence prayed that this court find it necessary that both parties be heard inter parties.

In reply, Mr. Shaabani also prayed that the counter affidavit affirmed by Salum Ramadhani filed in this court on the 24/02/2020 form part of his submissions. He then started his submissions by arguing that in order to put the records straight, this is the application to revise the ruling which

refused to set aside the ex-parte award and not the application challenging the ex-parte award, neither the proceedings leading to this ex-parte award. He then argued that in an application of this kind, the applicant ought to demonstrate good and sufficient cause for non-appearance, or in other words, why he did not appear when the case was scheduled for hearing and the reasons are usually demonstrated in the affidavit in support of the application. He pointed that the affidavit in support of the application stated that the non-appearance on the said date was because there were an outside of the court negotiations between the parties herein which implies the applicant was aware of the date of the hearing but on purpose they decided not to come to court.

Mr. Shabani pointed out that there is a long chain of authorities which explain that court orders must not be disrespected and their non-appearance of the said date shows that there was a deliberate ignorance of the court order. He submitted further that it is on record that on 07th June, 2017, the arbitrator Honorable Moses, set the matter to come for hearing on 22nd June 2017 in the presence of the applicant's advocate. On the said date, the arbitrator warned the applicant basing on their previous records of defaulting appearance that on the said date hearing will proceed ex-parte if they fail to appear. That despite that bold warning, the Counsel for the applicant defaulted to appear without giving any notice.

He submitted further that on the date set, the 22nd June, 2017, the wisdom of the arbitrator directed him to issue a new summons to inform the applicant that the hearing will precede on the 30th June 2017. It is on record that the said summons was dully sent to the applicant and again on

the 30th June 2017, having been served with the summons, they defaulted to enter appearance. That it was due to that wisdom, the Honorable Arbitrator ordered the matter to precede ex-parte. He hence argued that Mr. Evarist's contention that the award was illegally obtained is baseless.

Mr. Shabani then pointed out that in the 19 paras contained in the affidavit in support of this application; it is only under para 13 where the deponent has explained as to why he failed to appear before the commission and the reason being that he wanted to know what actually the respondent's claim was. He refuted this statement by submitting that the claims of the respondent were contained in CMA Form No. 1 which was duly served to the applicant and due to that, he was appearing in court. He argued that an outside of court proceedings is not a reason for the person not to attend to court proceedings, it just means that the negotiations may proceed while at the time court matters should also proceed. Further that the Courts are always called to decide what is before it and it is not the duty of the court to witch-hunt the intention of the parties. Due to that reason, he argued, the Honorable arbitrator was right to refuse the application to set aside ex-parte award as there was no sufficient reasons demonstrated by the applicant.

On the second issue of Public Servant, Mr. Shabani argued that dealing with the issue of whether the applicant is a public institution is not an issue to be determined at this point. That the issue can only be determined when the ex-parte award is set aside and that determining it in this application will make this court be dealing with the main award which is not the subject matter before me. That the ruling remains valid unless and

until that ruling is decided by a higher court and the only way the main award can be touched is if the ex-parte award is set aside. Further that failure to do so, the decision remains intact.

In rejoinder, Mr. Evarist argued that Mr. Shabani is misleading the court. That the applicant also intended to know whether the respondents were the employees of the applicants and if so, whether the internal procedures were followed before referring the matter to the CMA. He argued further that the referred CMA Form No. 1 does not show the relationship between the applicant and the respondents in the claim; it simply states the statements of the claims of the applicants. The mere fact that Form No. 1 was served on the applicants did not inform the applicants that those respondents were his employees.

He also submitted that the second summons was issued by the CMA on the 21st June, 2017. That there is no proof as claimed by the Counsel for the respondent that the summons was served and the information that the summons was served is contained in the award. On the accusations by the Counsel for the respondent which stated *"IFM ni kawaida yao kutokuja mahakamani"*, Mr. Evarist argued that it is a malicious statement and the Counsel was not supposed to harbor it because if IFM are judged that way. He then reiterated his prayer that the rights of the respondents are well noted by the applicant and also the applicant has its own rights so both parties' rights need to be protected by the Court.

Having considered the submissions of the parties, I will start with the second issue raised by Mr. Evarist, that the respondents are public servants hence subject to the Act. As correctly argued by Mr. Shabani, the

issue will not be determined at this stage. The issue should have been raised as an objection at the CMA and not at this stage. After all, on the 25/04/2017 at the CMA the applicant was represented by Mr. Mbaga and the issues for determination were framed. Unfortunately, the issue of applicability of the Act was not framed for determination. Furthermore, the same applicants argued that the respondents were not employees of the respondent while at the same time they are attempting to establish that they did not exhaust the remedies under the Act, so it seems the applicant's intended arguments are on trial and error basis.

Coming to the merits or otherwise of the application, the issue is to see whether the applicants have adduced reasons for non-appearance on the dates set for hearing. Mr. Evarist established two reasons for the failure to appear. First that the failure was caused by the respondents themselves who had engaged their representative and was making a follow up with the applicant. The second is that while the applicant was still negotiating with the representatives to know the issue, the respondents proceeded ex-parte without the knowledge of the applicant. Further that the respondents had not informed the applicant that they had withdrawn their instructions to their representatives. In reply, Mr. Shabani submitted that the affidavit in support of the application stated that the non-appearance on the said date was because there were an outside of the court negotiations between the parties herein which implies they were aware of the date of the hearing but on purpose they decided not to come to court. He also argued that negotiations outside the court are not a bar to proceedings in court.

I have gone through the records of this application and I am not convinced by the reasons adduced by Mr. Evarist. The records show that on the 25/04/2017 the applicant was represented by Mr. Mbaga and the issues for determination were framed. The matter was then scheduled to come for hearing on 17/05/2017 and on that date, the respondents' advocate was ready for hearing while the applicant's advocate gave an excuse that the case file was in another department and it was difficult to procure it. There were no submissions whatsoever that there were ongoing negotiations outside the court. The matter was then scheduled to come for hearing on 07/06/2017. It must be noted that the adjournment of the matter on that day was at the instance of the applicant.

On the 07/06/2017, a similar situation happened; there was an adjournment at the instance of the applicant. This time Mr. Mbaga's excuse was that he received the exhibits of the respondents' but he could not procure exhibits of the applicants for what he termed as "reasons beyond his control". The CMA adjourned the hearing so as to give a chance to the applicant to bring the exhibits in court; the matter was then scheduled on the 22/06/2017. On that date, the 22/06/2017 the applicant did not appear and no notice was issued. On the subsequent date of 30/06/2017, on an application of the respondents' advocate, the CMA invoked the provisions of Regulations 28(1)(a) of G.N No. 67/2007 and ordered the hearing to proceed ex-parte. The matter was then determined ex-parte and on 17/10/2017, the ex-parte award was delivered.

I have decided to narrate the chronology of events leading to ex-parte hearing to see whether there was justification for the CMA to proceed ex-

parte. As is clearly seen, the CMA was correct to do so because the applicant demonstrated lack of seriousness in several occasions. There were two excuses that led to unnecessary adjournments, they were for some flimsy reasons on availability of file or that they "need to go through the exhibits" and when he ran out of those excuses, the applicants advocate decided to disappear forgetting that the law has set remedy for such a conduct. Then the matter proceeded ex-parte and now it will be highly unfair if, after all the negligence that the applicant has demonstrated at the CMA, the court would simply set aside the ex-parte award. This will defeat the purpose of the law setting provisions for ex-parte hearing, let alone defeating the purpose of having specialized tribunals/commissions to deal with Labor issues in order to ensure speedier and more efficient dispensation of justice within the labor regime. I will not be the one to set that bad precedent because the applicant has not shown a single reason to convince the court to do so.

Having made the above findings, I see no merits in this application to warrant me to interfere with the findings of the CMA. Since the application before me lacks merits, it is hereby dismissed in its entirety.

Dated at Dar-es-salaam this 27th day of September, 2021

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) - INI YA MAHAKAMA YA KAZI

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S.M. MAGHIMBI
JUDGE