IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 696 OF 2018

(Originating from Labour Dispute No. CMA/DSM/KIN/R.114/16)

BETWEEN

PMM ESTATE (2001) LIMITED ..... APPLICANT

VERSUS

GODFREY DOTTO JUVENTINE..... RESPONDENT

JUDGMENT

Date of Last Order: 29/09/2021

Date of Judgment: 29/10/2021

I. ARUFANI, J.

The applicant, filed in this court the present application seeking for revision of the decision of the Commission for Mediation and Arbitration (hereinafter referred as the Commission) delivered in Labour Dispute No. CMA/DSM/KIN/R.114/16 by Hon. Mkenda, S - Mediator dated 06th September, 2018. The application is made under section 91 (1) (a), 91 (2) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (hereinafter referred as the ELRA) Rule 24 (1), 24 (2) (a), (b), (c), (d), (e) and (f), 24 (3) (a), (b), (c) and (d) and Rule 28 (1) (a), (b), (c), (d) and (e) of the Labour Court Rules GN. No. 106 of 2007.

The brief background of the present application is to the that, the respondent was employed by the applicant as a driver from 14th November, 2014 and his monthly salary was Tshs. 800,000/=. The respondent averred that the applicant ceased to remunerate him from August, 2015 without any cause. On 9th February, 2016 the respondent referred his complaint to the Commission claiming for his unpaid salaries from August, 2015. The respondent averred that on 24th May, 2016 he was terminated from his employment.

After the applicant failed to attend mediation hearing the complaint was heard and on 30th June, 2017 an ex-parte award was issued in favour of the respondent. The applicant's efforts to set aside the ex-parte award proved futile as the mediator dismissed the application in the ruling delivered on 6th September, 2018 for want of merit. The said ruling prompted the applicant to file the instant application in this court. When the application came for hearing the applicant was represented by Mr. Gabriel Masinga, learned advocate and the respondent was represented by Mr. Edward Simkoko, personal Representative and the application was argued by way of written submission.

Submitting in support of the application Mr. Masinga argued that, paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the affidavit supporting the application shows the applicant has advanced sufficient reasons for the court to grant the present application. He argued that, the applicant was not served with summons to appear before the Commission before the matter being ordered to proceed ex-parte. He submitted that, the Commission had determined several suits of the same parties but only one summons relating to mediation hearing was dully served to the applicant and the applicant was not served with any summons for arbitration hearing of the matter.

He submitted that the Commission entertained the matter which was time barred. He argued that, the respondent lodged the dispute in the Commission beyond the time prescribed under Rule 10 (1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007. He argued that, although the mediator acknowledged in the impugned award that the dispute was time barred but he proceeded to entertain the complaint and ordered the respondent be paid three months salaries.

He submitted that, the Commission ought to have granted the applicant's application for an order of setting aside the ex-parte

award. To strengthen his argument, he referred the court to the case of **EFFCO Solution (T) Ltd. v. Juma Omari Kitenge**, Rev. No. 753 of 2019 where it was held inter alia that, as the dispute was filed in the Commission out of time without proper order for condonation it was improper for the Commission to entertain the matter as it had no jurisdiction to entertain it.

The counsel for the applicant went on arguing that, the proceedings of the Commission is bad in law and the ex-parte award ought to be quashed for lack of proper service of summons. He argued that, the records of the matter show there is only one summons that was dully served to the applicant at mediation stage. He explained that, as the applicant is a company limited by shares its service for court documents was supposed to be properly done with proof thereof. He argued that, service of summons to the other party is mandatory as per Section 86 of the ELRA for the purpose of observing the principle of natural justice.

The counsel for the applicant argued that, the applicant was deprived of a right to be heard. To bolster his argument, the counsel for the applicant cited several cases in his submission including the cases of **Bridge v. Balwin** (1953) 2 All ER 66, **Severo Mutegeki &**

Another V. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA), Civil Appeal No. 343 of 2019, **Abbas Sherally & Others v. Abdul S.H. Fazalboy**, Civil Application No. 33/2002 and **Selcom Gaming Limited V. Gaming Management (T) and Gaming Board of Tanzania**, [2006] TLR 200 where the right to be heard and issue of rule of natural justice were deliberated.

Mr. Masinga contended that, it was improper for the mediator to dismiss the application to set aside the ex-parte award without going through the strong and sufficient reason adduced by the applicant. He referred the court to the case of **Samwel Kimaro v. Hidaya Didas**, Civil Application No. 20/2012 where it was stated that, in dispensing justice courts renders very valuable service to the society at large hence the society must have trust and faith in our court system. At the end he prayed the application be granted for the interest of justice.

In rebutting the application Mr. Simkoko prays to adopt the counter affidavit filed in the matter to form part of his submission. He argued that, the applicant's reasons for the application lacks merit. He submitted that the Commission conducted ex-parte hearing after the mediator being satisfied himself that the applicant was dully served

with the summons. He argued that, the respondent dully served the applicant with the summons physically and through post office, but the applicant decided not to honour the same. He referred the court to Rule 7 (1) (a) and 28 (1) (b) of the Labour Institutions (Mediation and arbitration guidelines), GN. No. 67 of 2007.

He submitted further that, although the counsel for the applicant raised the ground of illegality in his submission, but the same is not apparent on the face of the record. He went on submitting that, the said ground of illegality should not be regarded as a good ground for setting aside the Commission's award. He supported his argument with the case of **Moto Matiko Mabanga v. Ophir Energy PLC and 2 others**, Civil Application 463/01 of 2017 where the principle established in the case of **Lyamuya Construction Company Ltd. V. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (both unreported) was referred.

He also referred the court to the case of **Livercot Impex (T) Ltd. V. Hassan Bulugu and 4 Others** HCLD at DSM Revision No. 548 of 2019 (unreported) where it was said stated illegality has never been said to be automatically cause of granting extension of time. He submitted further that the applicant has failed to state how the

respondent's claim was time barred and at the end he prays the application be dismissed for want of merit.

In his rejoinder, Mr. Masinga reiterated his submission in chief. He insisted that, the respondent filed his dispute in the Commission out of time prescribed by the law. He also stated that, the stated illegality is a point of law as the respondent ought to have first filed the application for condonation. He submitted that, to the contrary the mediator wrongly proceeded to deal with the dispute which was time barred.

Having carefully considered the rival submission from both sides and after going through the record of the matter the court has found proper to state at this juncture that, the respondent's complaint was heard and decided ex-parte when it was at a mediation stage. That being the position of the matter the court has found the issue to determine in the present application is whether the mediator erred in dismissing the applicant's application for setting aside the impugned ex-parte award.

In order to be able to determine the stated issue properly the court is required to see whether the applicant managed to establish she was prevented by good grounds to attend the mediation hearing.

The court has framed the above issue after seeing section 87 (5) (a) and (b) of the ELRA upon which the application was made states that, the commission may reverse a decision made under that section if is satisfied there are good grounds for failing to attend the hearing. One of the decisions which can be made under that provision of the law as provided under subsection 3 (b) of that section is to decide the complaint where the other party to the complaint fails to attend a mediation hearing and that is what was done in the parties' case.

The above stated position of the law was put clear by this court when was determining the case of **MS Jaffer Academy V. Nhawu Migire**, Revision No. 71 of 2010 HCLD at Arusha (unreported) where it was that:-

> *"Where a party aggrieved by an ex-parte award on ground that the order to proceed ex-parte was wrongly made, the proper procedure open to the aggrieved party is to apply to the CMA, explaining the reason for failure to appear before it; and seeking its order to set aside the ex-parte award.* ***If the commission is satisfied that such a party had a good ground for failing to attend hearing, it will reverse the ex parte order so made and allow the matter to proceed interparte.***" [Emphasis added].

Basing on the afore stated position of the law the court has found the argument fronted before this court by the counsel for the applicant to establish there was a good ground for setting aside the ex-parte award issued by the Commission is that the applicant was not served with summons to appear before the Commission when the matter was fixed for mediation hearing. The counsel for the applicant argued that, the applicant was served with only one summons relating to the matter when it was at a mediation process. He argued that there is no summons served to the applicant when the matter was at arbitration process. The court has found pertinent to put it clear that, as stated earlier in this judgment the respondent's complaint was determined when it was at mediation hearing and it had not been referred to arbitration process.

That being the position of the matter the court has found Rule 7 (3) of the Labour Institutions (Ethics and Code of Conducts for Mediators an Arbitrators) Rules, GN. No. 66 of 2007 prohibits mediators or arbitrators to conduct any proceedings in the absence of parties, except where is satisfied that adequate notice of the time, place and purpose of the hearing have been served to the parties. For

clarity purpose the cited rule states as follows:-

> *"Every Mediator or Arbitrator shall not conduct a hearing without all parties being present, except where satisfied that adequate notice of the time, place and purpose of the hearing have been served to the parties."*

Where the complainant failed to attend the hearing, mediator may postpone the hearing or dismiss the complaint under Rule 14 (2) (a) (i) of the GN. No. 67 of 2007. Where the party to the other side of the complaint is adequately served with notice to appear for mediation hearing and defaulted to attend the hearing the mediator is required by Rule 14 (2) (a) (ii) of the same law to decide the complaint. The stated position of the law is also provided under section 87 (3) (a) and (b) of the ELRA. That being the position of the law the court has found the issue to determine here is whether the applicant was adequately and properly served with summons to attend mediation hearing before the complaint being determined ex-parte.

The court has found the argument by the counsel for the applicant that the applicant was served with only one summons relating to mediation hearing and he was not served with summons for arbitration hearing is a misconceived argument. The court has

arrived to the above finding after seeing that, the record of the Commission is not supporting his argument. The court has found that, the summons annexed to the affidavit supporting the application and argued is the only summons served to the applicant and required to attend mediation hearing on 28th February, 2017 was not the summons to attend mediation hearing of the complaint determined ex-parte against the applicant and in favour of the respondent. The court has found the summons annexed in the affidavit supporting the application was a summons for attending mediation hearing in Complaint No. CMA/DSM/ILA/R.104/17 which is a different complaint from the respondent's complaint which was Complaint No. CMA/DSM/ILA/R.114/16.

However, the court has found that, as stated in the impugned ruling of the Commission and rightly argued by the respondent's representative the record of the Commission shows the applicant was served with notice to attend mediation hearing through Tanzania Post Corporation on 12th February, 2016 and required to attend mediation hearing on 7th March, 2016. They were also served with notice to attend mediation hearing on 14th June, 2016 and that notice was received by their HR on 20th May, 2016. In addition to that, on 29th

June, 2016 they were served with another notice through Tanzania Post Corporation which required them to attend mediation hearing on 4th July, 2016.

The court has found that, the above stated service of notices of hearing of mediation to the applicant are supported by the receipts from the Tanzania Post Corporation filed in the record of the Commission and the one received by the applicant's HR was signed to show it was received on 20th May, 2016. Although the counsel for the applicant argued the summons was not received by the right person but the court has found there are those notices served to the applicant though post service which have not been challenged. To the view of this court the mode used to serve the applicant with the above stated summons is authorized by Rule 7 (1) (a) and (c) (i) and (2) of the GN. No. 64 of 2007 which states a party can be served by mailing the document by registered post or serve a document by hand to the party.

That being the position of the law the court has found that, as rightly found by the mediator the applicant was dully served with notice to attend mediation hearing but for the reason known to themselves, they failed to attend the mediation hearing. The

argument that the applicant was served with only one notice has no merit because even if it would have been found it is true that the applicant was served with only one summons for mediation hearing but there is no legal requirement for a party to be served with more than one summons or notice for the purpose of proving the party was dully served. The stated finding caused the court to see the argument by the counsel for the applicant that the applicant was denied right to be heard as she was not served with summons for mediation hearing is a misplaced argument and the cases cited by the counsel for the applicant to support his argument are not relevant in the matter.

Coming to the argument by the counsel for the applicant that the mediator entertained the matter which was time barred the court has found it is true that the mediator stated in the award which the applicant was seeking to be set aside that, some of the salary arrears claimed by the respondent were time barred. However, the mediator dealt with the said issue of the complaint to be filed in the Commission out of time and refused to grant the respondent the salary arrears for the period which he considered was out of time but granted him the salary for the period he found was within the time. That finding of Commission can be seen at page 3 of the ex-parte

award of the Commission dated 30th June, 2017 where it is stated that:

> *"Now, the complainant's claims fall under Rule 10 (2) and therefore was supposed to be filed within 60 days from the date that the respondent stopped to pay the salaries. That being the case, the commission maintains that the complainant is entitled to be paid salaries from February, 2016 to April, 2016. The other salary arrears as from August, 2015 to January, 2016 are time barred and thus the complainant was required to claim the said salary arrears by moving the Commission by filing an application for condonation ..."*

The issue as to whether the mediator was right or wrong in arriving to the above finding is not the issue to be considered by this court at this stage. The issue to be determined by the court here is whether the mediator was right to refuse to set aside the ex-parte award for the purpose of affording the applicant chance to address the Commission on the alleged issue of limitation of time which touches the jurisdiction of the Commission to entertain the complaint of the applicant.

The court has found that, as stated in the case of **MS. Jaffer Academy** (supra) in an application for setting aside ex-parte award

the applicant is required to satisfy the court or the Commission he was prevented by good ground to attend hearing of the matter. However, it was also stated in the case of **Mbeki Teachers Saccos V. Zahra Justas Mango**, Revision No. 164 of 2010 HCLD at Mbeya (unreported) that, sufficient reason is pre condition for court to set aside ex parte order.

That makes the court to come to the view that, although in an application for setting aside ex-parte judgment, award or order given by the court or Commission the applicant is required to show he was prevented by good ground to attend mediation or arbitration hearing but the court has found apart from good ground for failing to attend mediation or arbitration hearing it has also discretion to determine whether there is any sufficient reason for setting aside the ex-parte judgment, award or order. The above view of this court is getting support from a persuasive decision made by the Commercial Court of Kenya in the case of **Remco Ltd. V. Mistry Jadva Parbat and Co. Ltd. and Others** [2002] 1 EA 233 where it was held that:-

> *"If there is no proper or any service of summons to enter appearance, the resulting default judgment is an irregular one which the court must set aside 'ex debito justitiae' without exercising discretion. If the default judgment is*

regular one the court has unfettered discretion to set aside such judgment upon such terms as are just. In exercising the discretion, the court's concern should be to do justice between the parties, avoid hardship resulting from accident, inadvertence, excusable mistake or error and not to assist a person who has deliberately sought by evasion or otherwise, to obstruct or delay the course of justice.

The court has found the above quoted persuasive decision of our neighbouring country is correct position of the law which is also applied in our adjudicatory machinery to do justice to the parties. Basing on an inspiration derived from the above quoted case the court has found that, although the applicant failed to satisfy the Commission and this court that they were not served with summons to attend mediation hearing which to the view of this court make the ex-parte award to be regular but the court has found it has discretion to see whether there was sufficient reason for the ex-parte award issued by the Commission to be set aside.

The question here is what is the meaning of the words sufficient cause. The court has found when the Court of Appeal of Tanzania was attempting to define the words "*sufficient cause*" it stated in the case of the **Registered Trustees of the Archdiocese of Dar es**

Salaam V. The Chairman Bunju Village Government and 4 Others, Civil Appeal No. 47 of 2006 CAT at DSM that:-

> *"It is difficult to attempt to define the meaning of the words sufficient cause. It is generally acceptable however, that the words should have receive a liberal construction in order to advance substantial justice, when no negligence, inaction or want of bonafide is imputable."*

That being the meaning of the words sufficient cause and after seeing our courts and adjudicatory bodies have discretionary powers to set aside their ex-parte decision the court has gone through the affidavit used to support the application for setting aside the ex-parte award filed in the Commission and find that, apart from the deposition made in the affidavit that the applicant was not served with summons to attend the mediation hearing but it was also deposed therein that, the Commission entertained the complaint which was time barred and there are allegations that the complaint was referred to the Commission fraudulently as the respondent had already been paid all of his entitlements. The court has found the stated defence of the applicant were not considered and determined by the mediator in the ruling dismissed the application of the applicant for setting aside the ex-parte award.

To the view of this court the above stated defence of the applicant shows there were triable issues in the complaint of the respondent which were supposed to be considered and determined after hearing both parties in the complaint. As the main concern of the court and other adjudicatory bodies is to do justice to the parties the above stated defence of the respondent was sufficient cause for setting aside the ex-parte award issued against the applicant by the Commission. The above finding of this court is being bolstered by the decision made in the case of **Patel V. East Africa Cargo Handling Service Ltd.**, [1974] EA 75 where it was stated that:-

> *"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as it is in the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merit does not mean in my view, defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication".*

While being guided by what is stated in the above quoted case the court has found the defence stated by the applicant that the respondent had already been paid all of his entitlements raised a

triable issue which was a sufficient cause for setting aside the ex-parte award so as to afford the applicant chance of presenting the said defence before the Commission to enable the Commission to make a just decision to the parties. In the premises the court has found the arbitrator erred in dismissing the applicant's application for setting aside the impugned ex parte award.

Consequently, the ruling of the Commission dated 6th September, 2018 which dismissed the application of the applicant for setting aside the ex parte award is hereby revised and set aside. The ex-parte award of the commission issued in the parties' matter dated 30th June, 2017 is set aside and the court is ordering the Commission to hear the matter interparte. It is so ordered.

Dated at Dar es Salaam this 29th day of October, 2021

I. Arufani

JUDGE

29/10/2021

Court: Judgment delivered today 29th October, 2021 in the presence of Ms. Halima Semanda, Advocate holding brief of Mr. Denis Mramba, Advocate for the Applicant and in the presence of Mr. Dickson

Mpangala, Personal Representative holding brief of Mr. Edward Simkoko, Personal Representative for the Respondent. Right of appeal to the Court of Appeal is full explained.

I. Arufani
JUDGE
29/10/2021