

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION APPLICATION NO. 355 OF 2018

BETWEEN

SHIRIKA LA USAFIRI DAR ES SALAAM..... APPLICANT

AND

ABBAS KINGWABA AND 52 OTHERS 1ST RESPONDENT

TREASURY REGISTRAR.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Last order 12/10/2021
Date of Ruling 12/10/2021

B.E.K Mganga, J

On 29th June 2018, Shirika la Usafiri Dar es Salaam, the applicant, filed this application seeking the court to revise an award issued on 9th May 2018 by Hon. Msuri, A. Arbitrator, in Labour dispute No. CMA/DSM/MIS/10/12/325. The Notice of application by the applicant is supported by an affidavit sworn by Sechelela Chitinka, advocate and principal officer of the applicant. In her affidavit, the deponent raised 12 legal issues for determination by this court namely:-

- (a) That the complaint was time barred hence forth the honourable Arbitrator had no jurisdiction to adjudicate and /or entertain the complaint.*
- (b) That the award is tainted with illegality on the face of the record.*
- (c) That the Arbitrator erred in fact and in law by awarding the respondent terminal benefit without proof thereof.*
- (d) The Arbitrator did not consider the evidence on record hence reached on wrong conclusion.*
- (e) That the Arbitrator erred in fact and law in shifting burden of prove (sic) to the Applicant on the issue of retirement of other Respondents after reaching 55 years while there was no dispute on that.*
- (f) That the complaint was not legally filed in the Commission for Mediation and arbitration for failure to make application of the representative suit contrary to the laws.*
- (g) That the Arbitrator erred in fact and in law for failure to properly asses the evidence on record.*
- (h) That the award of the Arbitrator was granted without consideration of the law and proof thereof.*
- (i) That the arbitrator erred in law in granting payment to all the Respondents without their evidence.*
- (j) That the Arbitrator erred in law in using the evidence of two witnesses to grant the Application to all 53 respondents.*
- (k) That the Arbitrator erred in law in not computing the award.*

On 27th September 2021 when the matter was called, the CMA record was yet untraceable. Mr. Isaac Zake Advocate for the 1st respondent informed the court that he made follow up at CMA and was

informed that the file is untraceable and further that they were still tracing it. I asked counsel for the applicant and respondents as whether we can proceed with hearing of the application and determine it in absence of the CMA file or not. Mr. Garus Lupogo, state Attorney on behalf of the applicant submitted that it is impossible because the court need to read the record to see whether the complaint by the applicant has merit or not. In absence of the CMA record, that cannot be done. He was of the view that, the only option available remedy if CMA record cannot be traced is to nullify proceedings, set aside the award and order trial de novo. He prayed for adjournment to give more time to CMA officers to trace the file. On his side, Mr. Isaac Zake, Counsel for the 1st respondent concurred with the submission of Mr. Lupogo, State attorney on the remedy available if the CMA file cannot be traced and the option of adjourning the application to allow CMA officers more time. I found wisdom in their prayer of adjourning the application on that date to allow CMA officers more time to trace the file. I therefore adjourned this application for hearing on 12th October 2021 as the last option.

When the matter came today for hearing, MR. Edwin Joshua Webiro, State Attorney assisted by Sechelela Kintika, State Attorney

appeared for the applicant while Isaac Zake, advocate appeared for the 1st respondent.

Parties were informed that CMA is yet untraceable and has not been brought to the court. Being so informed by the court, Mr. Webiro, State Attorney submitted that, basing on section 91 of the Employment and Labour Relations Act [Cap. 2019] that gives this court power to revise CMA awards, in absence of the CMA award, revision cannot be made. That it is the CMA record that enables the court to ascertain whether the proceedings and award were done in compliance with the law or not. He therefore, prayed that CMA proceedings be nullified, award be set aside and order trial *de novo*.

On his side, Mr. Zake, counsel for the 1st respondent was in agreement with Mr. Webiro, State Attorney that in absence of the CMA record, the Court cannot exercise its powers under section 91(1) of Cap.366 supra. Mr. zake, counsel for the 1st respondent submitted that it is difficult to set aside the award based on absence of the CMA file as the respondents has not complained against defectiveness of the award. He therefore prayed the award be upheld. When asked by the court as to what has to be looked at by the court at the time of revising or upholding the award, he conceded that the court has to look only on the

proceedings. He maintained that the award be upheld because nullification of the proceedings and setting aside the award will cause injustice to the 1st respondent who had nothing to do with keeping the CMA record. When asked whether the applicant had anything to do with keeping the CMA record and whether she will not be affected, counsel for the 1st respondent conceded that applicant suffers the same effect with the 1st respondent and that both has nothing do with keeping CMA file.

In rejoinder, Mr. Webiro, State Attorney, submitted that prayer for adjournment is wastage of time since the file is untraceable since 2019 and reiterate his submission in chief.

I have considered submissions by the State Attorney and counsel for the 1st respondent and I am in agreement with them that in absence of the CMA record, none of the legal issues raised by the applicant in the affidavit of Sechelela Kintika can be determine properly. Their only point of departure is the path to be taken at this moment in order to do justice to the parties. Mr. Webiro, State Attorney submitted that proceedings should be nullified, and the award set aside and order trial *de novo* but Mr. Zake, counsel for 1st respondent was of the view that the award be upheld as nullification of proceedings will cause injustice to

1st respondents. With due respect to counsel for the 1st respondent, no award can be upheld without the court scrutinizing proceedings and the award itself. I understand that 1st respondent has remained with the award since 2018 and that is a long time, but justice also has to be done to the applicant who, has also a right to be heard. Absence of CMA record was neither caused by the applicant nor the respondents. The court and the parties were caught in this situation caused by a different entity or person altogether. None of the parties at this moment is on the better side than the other.

I have examined the court record and find that on 7th November 2019, the Deputy Registrar called for the aforementioned CMA record vide his letter with reference No. REV.355/2018 dated 7th November 2019. In the said letter directed to the Director of CMA, the Deputy Registrar after quoting the abovementioned CMA file number, he said:-

"Grateful forward to this Court the original record of your above reference together with all documentary exhibits, if any, and typed copies of proceedings, (if available) for revision."


On 15th April 2020, another reminder calling for record was sent to the Director CMA. On 26th August 2021 Hon. S.M. Maghimbi, J, the judge in-charge, wrote a letter with reference No. DMK/C.40/15 PART II/93 as a reminder and attached to that letter all files which CMA record

has not been brought leading to backlog of cases in the court. We took trouble of calling the in charge of CMA and direct him to trace and bring several CMA record the one under consideration inclusive, as these cases were scheduled in special sessions. The in charge of CMA undertook to do so in advance before commencement of the session on 27th September 2021 the date this application was scheduled for hearing, but his efforts proved failure. I adjourned this matter to 5th October 2021 to give more time to CMA officers to trace the CMA file and bring it to me so that the application can be heard. With all these efforts, the file was not brought as it is untraceable. Counsel for 1st respondent submitted that his client has nothing to do with keeping CMA files as such to nullify proceedings and award will cause injustice and prayed the award be upheld. Much as I agree with counsel for the 1st respondent that his client has nothing to do with keeping CMA files, but the award cannot be upheld without going through the CMA record as correctly submitted by both counsels. I don't see any base or justification to the prayer by counsel for 1st respondent that the award should be upheld in absence of the CMA record. In other words, counsel is inviting the court to rubber stamp the decision of CMA. That, invitation, cannot by any means, be accepted. In absence of the CMA file this court cannot rule out the grounds of revision quoted above. For

example, it is impossible to clear out the issue of jurisdiction of CMA over the dispute as applicant deponed in the affidavit that the dispute was time barred. More so, it was deponed that arbitrator used only evidence of two witnesses to grant the award to all 53 applicants without evidence adduced in their favour.

For the foregoing, I hereby nullify CMA proceedings and set aside the award arising therefrom and order that if parties are still interested in the dispute should go back to CMA to be heard de novo before a different arbitrator without delay.




B.E.K. Mganga
JUDGE
12/10/2021