

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

REVISION APPLICATION NO. 532 OF 2020

(Originating from Labour Dispute No. CMA/DSM/KIN/R.188/18)

BETWEEN

GRAND VILLA HOTEL.....APPLICANT

VERSUS

SAADA KIMASHALO.....RESPONDENT

JUDGMENT

Date of Last Order: 16/11/2021

Date of Judgment: 28/01/2022

I. Arufani, J.

This application was filed in this court by the applicant as he was dissatisfied by the ruling of the Commission for Mediation and Arbitration (hereinafter referred as the CMA) delivered in Labour Dispute No. CMA/DSM/KIN/R.188/18 by Hon. Fungo E. J., Arbitrator. The Hon. Arbitrator dismissed the application for extension of time to set aside the ex-parte award issued on 4th September, 2018 filed at the CMA by the applicant for want of sufficient reason to allow the application. The application was supported by the affidavit of Meshack Jonas Matende, the applicant's Principal Officer and the

respondent opposed the application by filing her counter affidavit in the court.

The brief facts of the matter as can be found in the record of the matter are to the effect that, the respondent was employed by the applicant as hotelier on unspecified period of time from July, 2017. She proceeded with the employment until 30th January, 2018 when the respondent alleged that, she was told to go on leave without pay. The respondent was aggrieved by the decision of the applicant and decided to refer the dispute to the CMA. The dispute was heard ex parte and the respondent was awarded twelve (12) months salaries as compensation for being unfairly terminated from her employment, 1 month salary in lieu of notice and one of month salary in lieu of leave.

The applicant was aggrieved by the ex-parte award and filed omnibus application in the CMA seeking for extension of time to set aside the ex-parte award and an order of setting aside the ex-parte award. After hearing the parties the CMA dismissed the application for extension of time on ground that the applicant had failed to adduce sufficient cause for the delay to file an application for setting aside the CMA's ex parte award within the time prescribed by the law.

The applicant was dissatisfied by the decision of the CMA and filed the present application in this court urging the court to revise the decision of the CMA by basing on the grounds listed hereunder:-

- i. Whether it was legal for the mediator to proceed with mediation arbitration in absence of the applicant.*
- ii. Whether the mediator and arbitrator were fair to entertain defective CMA F1.*

Both parties were represented in the matter. While the applicant was represented by Advocate Armando Swenya, the respondent was represented by Mr. Joseph Basheka, Personal Representative. Following the problem of Covid-19 pandemic the court ordered the parties to argue the application by way of written submission. Thus, the application was argued by way of written submission.

Submitting in support of the application, the counsel for the applicant argued in relation to the first ground of revision that, the arbitrator and mediator erred in law and fact by entertaining the matter in absence of the applicant. He submitted that, even the impugned ruling was erroneously reached as the applicant had shown good cause to warrant grant of extension of time to set aside the ex-

parte award. He explained that, there was improper service of summons to the applicant and there was no proof of service required to be effected under Rule 6 (2) (a) (b) and 7 (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007.

He argued that, according to annexure GVH5, the summons was served to the applicant on 28th March, 2018 which was the day after hearing of the dispute as the hearing was conducted on 27th March, 2018. He argued further that, although it was stated the applicant was served with summons to appear before the CMA and it was received by Joyce Kalyalya but the mentioned person is unknown to the applicant. He argued that suffices to prove there was no proper of service of summons to the applicant.

He submitted that, the CMA ought to grant the applicant extension of time to file an application to set aside the ex parte award in the CMA out of time. He submitted further that, failure to serve notice of hearing of the combined mediation and Arbitration to the applicant as required by the law contravened Rule 18 (2) of GN. No. 64 of 2007 which requires at least a written notice of fourteen days to be issued to the parties.

He argued in relation to the illegality stated is featuring on the CMA F1 that, the CMA was not properly moved to entertain the dispute due to contradictions appearing in the CMA F1 in relation to the date when the dispute arose. He stated that, while the respondent stated at page 3 of the CMA F1 the dispute arose on 30th January, 2018 but it is indicated at Part B of the CMA F1 that the respondent was given notice of termination of her employment on 4th July, 2017 which shows the dispute was referred to the CMA out of time.

He went on arguing that, the CMA F1 does not state the reliefs claimed by the respondent by stating the amount of compensation the respondent was claiming from the applicant. To support his submission the counsel for the applicant cited the case of **Leopard Tours Ltd v. Rashid Juma & Another**, Revision No. 55 of 2013 (unreported).

He further submitted that, there is illegality in the award as the respondent was the employee of less than six (6) months. He argued that, although the respondent was not covered under sub part E of the ELRA but the Hon. Arbitrator found that the respondent was unfairly terminated and proceeded to award her the reliefs stated

earlier in this judgment. At the end he prayed the court to grant the applicant the order is seeking from this court.

In opposing the application, the personal representative for the respondent submitted that, the counsel for the applicant misdirected himself by arguing about the applicant not being served with summons to appear before the CMA. He stated that, the issue as to whether the applicant was served or not served with the summons cannot be determined in this application because, the application which was rejected by the CMA was for extension of time within which to file an application to set aside the ex parte award in the CMA and application to set aside the ex parte award. To support his argument he referred the court to the case of **Aristides Pius Ishebabi v. Hassan Issa Likwendembe & 3 Others**, civil Application No.5/2019.

He further submitted that, the CMA was correct to dismiss the application for extension of time for failure to adduce sufficient cause for the delay and account on each day of the delay. He stated although the applicant stated before the CMA that she was aware of the ex parte award on 16th November, 2018 but the application for extension of time was filed at the CMA on 28th December, 2018 which

was about 42 days from when the applicant became aware of the ex-parte award. To strengthen his submission, he cited several cases in his submission to insist that, the applicant had a duty to account on each day of the delay. One of those cases is the case of **Bushiri Hassan V. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 where it was held that, delay of even a single day, has to be accounted for.

Coming to the ground of illegality, the representative for the respondent submitted that, the applicant did not raise the claim of illegality or defect in the CMA F1 or in the affidavit filed in the CMA to support the application. He stated that, the applicant raised the issue of illegality in her written submission while parties are not allowed to introduce a new issue in their submission as submission is not evidence. To strengthen his argument, he cited the case of **Nyanza Road Works Ltd. v. Yassin Mrisho & 4 Others**, Misc. Appl. No. 8/2019 where it was held that, advocates submissions are not evidence. In conclusion he prayed the application for revision filed in this court by the applicant be dismissed and the CMA's ruling be confirmed.

Having carefully considered the rival submission from the parties and after going through the record of the matter and the applicable laws the court has found the issues for determination in this application is whether the Hon. Arbitrator erred in refusing to grant the applicant extension of time to apply for an order of setting aside the ex parte award. The court has found that, an application to set aside an ex parte award issued by the CMA, is governed by Rule 30 (1) of the Labour Institutions (Mediation and Arbitration) GN. No. 64 of 2007 which states as follows:-

"An application by a party to correct or set aside an arbitration award in terms of section 90 of the Employment and Labour Relations Act, shall be made within fourteen days from the date on which the applicant became aware of the arbitration award."

The court has found in the matter at hand the ex parte award which the applicant is seeking to be set aside was issued on 04th September, 2018. The applicant stated in his affidavit that they became aware of the ex-parte award on 16th November, 2018. The counsel for the applicant argued that, the applicant filed in the CMA the application for extension of time to file the application to set aside the CMA's ex-parte award on 28th December, 2018. That being

undisputed facts, the question is whether the applicant had sufficient cause for the delay and if the applicant has accounted on each day of the delay. It was the CMA finding that the applicant had failed to show sufficient cause for the sought extension of time to be granted.

The court has found that, as stated by the Court of Appeal of Tanzania in the case of **Elias Msonde V. R**, Criminal Appeal No. 93 of 2005 it is trite law that, for an application of extension of time to be granted, the applicant must convince the court that he was prevented by sufficient or reasonable or good cause and that the delay was not caused or contributed by dilatory conduct or lack of diligence on his part.

The court has found that, in the present application the counsel for the respondent did not submit on the reason caused the applicant to delay to file in the CMA the application to set aside the ex parte award within the time prescribed by the law. Instead of that he challenged the ex parte award issued by the CMA and the CMA F1 filed in the CMA. He argued that, there was improper service of summons and there is illegality in the impugned award as the respondent was awarded compensation for unfair termination while

she was the employee with less than six months in the employment and she was not covered by the principles of unfair termination.

The court is of the considered opinion that, as rightly argued by the respondent's representative the said reason ought to have been raised in an application for setting aside the ex-parte award which is yet to be filed in the CMA and not in the application for extension of time which was not granted. The court is joining hand the submission by the respondent's representative that the applicant was required to adduce sufficient cause for the delay and account on each day of the delay from the date of becoming aware of the ex parte award to the date of filing the application for extension of time in the CMA as stated in the case of **Bushiri Hassan v. Latifa Lukio Mashayo** (supra).

However, the court has considered the illegalities alleged by the counsel for the applicant are in the impugned award, CMA F1 used to initiate the dispute and the proceedings of the CMA and find that, some of the stated illegalities are vivid on the face of the record as alleged by the counsel for the applicant. The court has found the issue of service or non-service of the summons to the applicant raised a doubt as to whether the applicant was really and properly served as

provided under Rule 6 (2) (a) and (b) read together with Rule 7 (2) of the GN. No. 64 of 2007.

The court has arrived to the above view after seeing that, the allegation raised by the applicant that, Joyce Kalyalya who is indicated in the summons she received the summons on behalf of the applicant is unknown to the applicant raised a great doubt if the applicant was properly served but that allegation was not properly addressed by the Hon. Arbitrator before refusing to grant the applicant extension of time she was seeking from the CMA. The court has found if the said reason was properly addressed, the Hon. Arbitrator would have found there was no sufficient proof that the applicant was dully served to the extent of refusing to grant them extension of time to apply for an order of setting aside the ex parte award.

The court has also considered other illegalities alleged are appearing in the CMA FI in relation to when the cause of action for the respondent arose for the purpose of determine whether the dispute was filed in the CMA within or out of time and find that, despite the fact that the stated illegality was not raised in the affidavit filed in the CMA by the applicant but it is an important point

of law which is supposed to be considered before refusing to grant the application of the applicant. The alleged illegalities caused the court to find that, if the applicant will not be granted extension of time to apply for the order of setting aside the impugned ex-parte award the stated illegalities will never be determined and justice will not be done to the applicant.

The court has arrived to the above finding after seeing that, it is a principle of law that, once the issue of illegality of an impugned decision is raised and the court is satisfied is a point of sufficient importance the court is required to use that point as a good cause for granting extension of time. That principle of law has been stated in a range of cases and one of them is the case of **Principal Secretary, Ministry of Defence and National Service V. Devram Valambhia [1992] TLR 182**, where it was held that:-

"In our view when the point at issue is one alleging illegality of the decision being challenged, the court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

It was also stated by the Court of Appeal of Tanzania in the case of **Attorney General v. Consolidated Holding Corporation and Another**, Civil Application No. 73 of 2015, that:-

"...contentious as to illegality or otherwise of the challenged decision have now been accepted as a good cause for extension of time."

Basing on the above stated principle of the law, the court has found there was good cause for the CMA to grant the applicant extension of time to apply for an order of setting aside the ex-parte award which the applicant alleges is tainted with illegalities. In the premises the application of the applicant is granted. The ruling of the CMA dated 28th June, 2019 is hereby quashed and set aside. The applicant is granted fourteen (14) days from the date of delivery of this judgment to file in the CMA the application to set aside the ex-parte award. It is so ordered.

Dated at Dar es Salaam this 28th day of January, 2022.



I. Arufani

JUDGE

28/01/2022

Court: Judgement delivered today 28th day of January, 2022 in the presence of Ms. Kambibi Kamugisha, advocate for the Applicant and in the absence of the respondent who is well aware the matter is coming today for judgment as she was informed by the Court Clerk through the telephone. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to read 'I. Arufani'.

I. Arufani

JUDGE

28/01/2022