

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 309 OF 2020

ROBERT NICHOLUS MOSHI YOELI APPLICANT

VERSUS

JOSEPH S. KIMARO RESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Ubuṅgo)

(Mahiza: Arbitrator)

Dated 03rd July 2020

in

REF: CMA/DSM/UBG/103/19

JUDGEMENT

14th & 29th March 2022

Rwizile J

This application is for Revision. It emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/UBG/103/19. This Court has been asked to call for and revise the proceedings, ruling and decision of the CMA. Brief facts behind this case is that in March 2018 the applicant closed his business, by filing a notice with Tanzania Revenue Authority. Following the event, sometimes later, the respondent who alleged worked as the driver of the applicant's motor vehicle, filed a labour dispute at CMA claiming to be unfairly terminated. He asked for payment of terminal benefits to wit; salary arrears, leave, severance pay and 12 months salaries as compensation for

unfair termination. Failure of the applicant to enter appearance led the matter be heard ex parte. On 12th February 2020, an ex parte award was issued. When the applicant became aware of the ex parte award filed the application to set it aside. The same was dismissed for failure to show good cause that led to his absence. Aggrieved by the ruling hence this application to challenge it. Grounds for the revision raised by the applicant are as hereunder: -

- i. That, the dismissal order is illegal for being unreasonably reached, and by curtailing or debarring the applicant's right to be heard as far as the impugned ex parte award is concerned.*
- ii. That the arbitrator erred in law and in facts for basing her decision on non-appearance during the hearing of the case at the commission only, leaving other fundamental grounds viable for granting the application to set aside an ex parte award.*
- iii. That the arbitrator erred in law and in facts for holding that, the applicant failed to adduce good cause for non-appearance during the hearing of the case at the commission.*

The applicant was represented by Mr. Edward Simkoko Personal Representative, whereas the respondent was represented by Mwita Masiko, Personal Representative.

Mr. Simkoko submitted on the first issue that, the ruling dated 3rd July 2020, be set aside because the applicant was not duly served. He continued to argue that the summons was sent to the place where the applicant lived. It was not received by the applicant himself because the applicant had closed the shop.

On the second issue, Mr. Simkoko submitted that there were illegalities as the respondent was awarded what was not asked in the CMAF1. In his view, it was wrong to come to that conclusion. He then cited the case of **Joakim Mwanikwa v Golden Tulip Hotel**, Revision No. 268 of 2013, High Court of Dar es Salaam also the case of **Enock Kalibwani v Ayoub Ramadhani, Raymond Jacob Elikana (administrator of the deceased estate of Jacob Elikana Muro) and Yusuph Mhando**, Civil Application No. 491/178 of 2018, Court of Appeal of Tanzania.

Mr. Simkoko on the third issue submitted that, the application was out of time. That the respondent said was not paid salaries for 24 months and so the application was out of time. That, based on the evidence of the respondent, there was a dispute on whether he was employed or not. He therefore prayed that the ruling be set aside.

Opposing the application Mr. Mwita had this to submit. On the issue of service, he said, it was properly done via postal office and was received

by the applicant on 20.02.2020. That, after the applicant was made aware of the award, he sought the CMA to set it aside. He further said that the application before the CMA was not time barred. Mr. Mwita submitted more that, the applicant argued that on 29th May 2019, the respondent was on the way to Congo as per exhibit JK1 and was still working with the applicant. He went on saying, that on 13th July 2019, he was working with the applicant as per exhibit JK6. He was driving T 697 AWZ trailer, No. T 724 BBZ as annexure RC1 shows.

Mr. Mwita submitted further that the respondent worked and was terminated on 27th July 2019 and was not paid since 2017. He further submitted that; the respondent was not a casual worker.

According to him, he was employed as the law requires. He cited section 4 and 61 of Employment and Labour Relations Act and the case of **M/S Mkurugenzi Nowu Eng v Godfrey M. Mpezya**, Revision No. 451 of 2016, High Court at Dar es Salaam.

In a rejoinder, Mr. Simkoko had this to submit; that the respondent was not in employment. The applicant was not paid in 24 months and it does not show employment relationship.

Having heard the parties, the court is required to determine the 1st and 3rd issues together because they all hinge on *Whether the applicant failed*

to show sufficient cause for his failure to attend the application before the CMA. While the second issue is whether the CMA was to consider other matters to warrant setting aside the ex parte judgement.

In law, failure to attend a case in court or before the CMA has its consequences. But that comes after due service to the party must be proved. For the ex parte hearing therefore to be set aside, the applicant has to show to the satisfaction of the court that failure to attend a matter in court was not due to his own fault. The main point here is whether there was due service on party of the applicant.

Under Rule 6(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules G.N. No. 64 of 2007. It can be done by delivering the document to the person concerned, his representative or any other person found at his residence, place of business or work, but the "other person" referred here has to appear to be at least 18 years.

Still, the same can be left at the known address or such other premises. It can be sent by registered post to the last known address etc.

Since service is one thing and proving due service is another, it must be proved that terms of due service have been complied with as under Rule 7(1) to (4) of the same rules.

Based on the CMA record, the summonses were taken to the place of business of the applicant (Ndula Shop) at different time by City Urgent Mail delivery as exhibits, JK1, JK2 and JK3 have shown. But still, the same are not free from anomalies. At times they were not showing who received the same. For instance, the one dated 18th October 2019, the other one simply shows the signature without a name of the recipient and JK1 is alleged received by Hellen Moshi.

As shown before, Rule 7 of G.N. No. 64 of 2007 provides for proof of service of document where: -

"7(1) A party shall prove that a document was served in terms of these rules by providing the following:

(a) Proof of mailing the document by registered post to the other party;

(b)

(c) If a document was served by hand-

(i) With a copy of a receipt signed by, or on behalf of the other party clearly indicating the name and designation of the recipient and the place, time and date of service"

It is important to note that the law cited above insists that there must be proof. The documentary proof tendered are exhibits JK1, JK2 and JK3, which as I have shown were inconsistent.

I think, the service was not duly done. It should be added that, when there is a dispute as to whether the summons has been duly served or not. It is the person alleging due service cast with the duty to prove it. The court as well is cast with the duty to examine the present evidence to make sure that the same proves that it indeed happened as the law requires.

Further, to the stated means, under rules 6, the CMA is empowered to devise other appropriate means, which I think may include use of *email*, mobile phone calls and even advertising in the newspapers with wide circulation. All this is aimed at providing means through which every party should be given a chance to be heard unless it is apparent that the same has been deliberately neglected. In my considered view, the two issues have been answered that there was no due service.

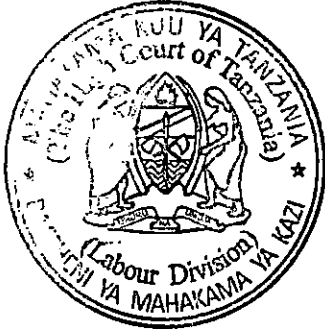
The applicant has cited a number of authorities. I have gone through the same, but with respect they are referring to extension of time applications which are distinguishable. This court is dealing with if there were sufficient reasons for setting aside an *exparte* award.

Further, I think the powers of this court are set out under section 91(1) and (2) of ELRA read with Rule 28 of the labour Court Rules (G.N No.106 of 2007). Through the same, this court is enjoined to revise any proceeding of the CMA if it appears to have acted with material irregularity. Although there is no single definition of what constitutes such irregularities but suffices to note that any non-compliance with, or in contravention of the legislation, rules or regulations or other acts or doing acts which are inconsistent with the well and applied principals of law that results in or is likely to result to failure of justice.

Having perused the record, there are serious allegation of whether the CMA had jurisdiction to determine the matter filed out of time. It has been agreed by the respondent's counsel that the respondent was claiming for salaries for 24 months. That means, he may have worked without a salary for all that long. It is also apparent that the evidence of Joseph Said Kimaro was record without oath or affirmation.

In my considered view the evidence so recorded is invalid as it contravenes Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN No. 67 of 2007. This therefore constitutes material irregularity to warrant setting aside the award

That being the case therefore, and for the foregoing reasons, this application is granted. The ruling of the CMA dated 3rd July 2020 is quashed and orders therefrom set aside. The record is remitted to the commission to allow the matter to be heard interparties. Each party to bear its own costs.



A.K. Rwizile

JUDGE

29.03.2022

Labour Court TZ.