IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION FOR REVISION NO. 37 OF 2022

(From the award of Commission for Mediation & Arbitration at Ilala in Labour Dispute No. CMA/DSM/ILA/R.1076/16)

ST. MARY'S INTERNATIONAL ACADEMY LTD.....APPLICANT

VERSUS

HELLEN NTINDA.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

20th October 2022 & 27th October 2022

The applicant filed the present application for revision challenging the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala (CMA) which was decided in favour of the respondent. The applicant is praying for this court to revise the proceedings of the CMA in **Labour Dispute No. CMA/ILA/R.1076/16,** quashing, and set aside the award alleged to be improperly and illegally procured.

The dispute developed out of the following context. The respondent was employed by the applicant from 06th May 2000 until on 15th February 2013 when his employment was terminated for an alleged closure of applicant's business. (See the employers opening statement in the CMA record). Aggrieved with the termination, the respondent filed a complaint in the Commission for Mediation and

Arbitration at Dar es Salaam, vide **Labour Dispute No. CMA/ILA/R.142/13/185** against the St Mary's International. An award in respect of this matter was delivered on **17th October 2013** before Hon. Kiwelu, L., the arbitrator. The Respondent commenced execution processes for the award before vide **Execution No. 93 of 2015** of this Court. She later withdrew the application for execution on the reason that the Decree Debtor (St. Mary's International) was a wrong party in the CMA. After the withdrawal, the respondent filed Labour Dispute No. CMA/DSM/ILA/R.1076/16 suing St. Mary's International Academy, which in her view was the appropriate party, claiming for unfair termination substantively and procedurally as indicated in CMA Form No.1. In Labour Dispute No. CMA/DSM/ILA/R.1076/16, the CMA found that the respondent's termination was substantively and procedurally unfair and awarded **TZS 9,750,000/=** as compensation. The arbitrator found further that the respondent was not consulted regarding the alleged reason for her retrenchment (restructuring of employer's business).

Aggrieved by the CMA's award the applicant filed the present application. The application has presented four points as grounds of revision. What I comprehend from these grounds can be paraphrased thus the Applicant is challenging the CMA award basing on the

following issues: -

a) Whether the Commission for Mediation and Arbitration could extend time for filing application for condonation without sufficient cause.

b) Whether the Deputy Registrar had powers to grant order for re-filing of an application at CMA.

c) Whether the CMA could hear the matter afresh instead of an application for correction of errors.

d) Whether the CMA had jurisdiction to determine the dispute.

In this application, the applicant was represented by Mr. Emmanuel Augustino, Advocate from a law firm styled as Augustino Law office whereas Ms. Mariam Ismail, Advocate represented the respondent. Parties argued the application by way of oral submissions.

On the **first** issue as to **whether the arbitrator was correct to grant condonation without sufficient cause,** Mr. Augustino Emmanuel submitted that the respondent was responsible to account for the period from when the cause of action arose in 2013 when the applicant left the job to 2016 when the application was lodged to 2018 when the decision was made. He is of the view that there was a material irregularity in granting condonation without reasons. In his view the arbitrator extended time arbitrarily.

Regarding the **second** issue as to whether the Deputy Registrar had power to grant orders for refiling of an application in the CMA, Mr. Augustine Emmanuel submitted that the matter was refiled at CMA by a leave which was granted by Lyimo Deputy Registrar. He averred that amongst the powers of the Registrars, none involves giving leave to a party to file a matter in the CMA. He submitted that this means the registrar exercised her powers illegally hence the award was procured from illegal proceedings.

Addressing the **third** issue as to **whether the CMA had to hear the matter afresh instead of having an application for correction of errors contains in the award,** Mr. Augustine Emmanuel recalled that in 2013 the respondent lodged complaint No. CMA/ILA/R.143/13/185, parties being the complainant Hellen Ntinda and St. Mary's International being the Respondent. That the matter was decided by Kiwelu Arbitrator who issued his decision on 17/10/2013 awarding the complainant what she came to execute in in the High Court vide **Execution No. 93 of 2015** which was withdrawn by the applicant having noted that she sued St. Mary's International instead of St. Mary's International Academy. According to Mr. Augustino, the Respondent asked for leave from Hon. Lyimo to withdraw the application for execution with leave to refile it in the

CMA and the said leave was granted and the matter was refiled in the CMA. He challenged the Deputy Registrar's power of granting the leave to refile the matter at CMA. He is of the view that the remedy was to seek extension of time so as to file application for correction of errors in the CMA as provided under **Rule 25 (1) of the Labour Institutions (Mediation and Arbitration Rules) G.N No. 64 of 2007** and not to refile a fresh application.

Concerning the **fourth** issue on jurisdiction, Mr. Augustine Emmanuel submitted that CMA had no jurisdiction as the matter was ***functus officio***. In his opinion CMA did not have power to re-open the matter.

Finally, in the **fifth** issue, Mr. Emmanuel addressed the substantive issue concerning the respondent's contract of employment challenging the CMA awarded of TZS 9,000,000/= being the salaries for 15 months which remained in the employment contract after a holding that there was a contract of 2 years. Mr. Emmanuel submitted that the respondent was terminated in accordance with the law and she did not have 15 months as a remaining period in her contract. He referred to **Exhibit P1** which was tendered by the respondent for two years contract. He stated that at the time the applicant was terminated his contract of 2 years, had already lapsed

and she was paid severance allowance and notice plus other payments to the tune of a total of TZS 3,575,000. He complained against the arbitrator for having not taken into account this ending arrangement of the employment contract. Supporting his stand, he cited the case of **Mohamed Kijida vs. Everything Dar Company Limited, Rev. No. 694 of 2019 TLCD of 2020, page 1797**. According to him, in this case it was held that, once an employment contract is terminated in accordance with the terms of the contract, one cannot later claim for unfair termination. He thus prayed for the CMA award to be quashed and the matter remitted back to the CMA for the proper remedy.

In reply, Ms. Mariamu Ismail started to alert that the revision application before this Court is to revise the decision of the arbitrator arising from **Labour Dispute No. CMA/DSM/ILA/R.1076/16**. In her view the issues raised in the affidavit do not relate to this labour dispute but the older one decided by Hon. Arbitrator named Adam in 2018 and on the decision of Hon. Deputy Registrar of 17th August 2016.

Starting with the issue of condonation without sufficient cause, Ms. Mariam submitted that the condonation was issued by Hon. Adam, Arbitrator on 18th May 2018. In her view, it is time barred on the

reason that the decision is dated 2018 and no extension of time has ever been granted to have any application against this decision determined and therefore it was wrongly brought at revisional stage in application which concerns the decision of Arbitrator Makanyaga.

Without prejudice to the above, submitting on the substance of condonation, Ms. Mariam stated that the applicant was waiting for a copy of the decision of the High Court which was the reason for delay, and the Arbitrator correctly found it to be a sufficient cause for condonation.

As to whether the deputy registrar had jurisdiction to allow refiling of the matter in the CMA, Ms. Mariamu submitted that the Execution application No. 93 of 2015 was withdrawn by the respondent as per annexure HNI. She stated that Hon. Lyimo did not order refiling of the application in the CMA so the applicant's argument is misconceived.

On the **third** issue as to whether the CMA should not have heard the matter afresh instead of correction for errors, Ms. Mariamu Ismail submitted that the issue of a name was not clerical error but a mistake of suing a wrong party. In her view, having a wrong party sued, the applicant had to start afresh to sue a proper party. She stated that **Section 90 of the Employment and Labour**

Relations Act, allows only correction of clerical mistakes, while in the instant matter, there was no clerical mistakes but suing a wrong party. In her opinion, the only alternative was to have a new matter before CMA against the proper party.

Regarding to the fourth issue on the substance of the decision of Hon. Makanyaga in awarding 15 months as a remaining period of contract, Ms. Mariam challenged the applicant's argument that the contract expired hence payment of 15 months was not proper. Referring to page 12 of the decision of Arbitrator Makanyaga, Ms Mariam contended that, it is indicated in the award that the respondent had a contract of 2 years and the respondent did not stay for long but she was terminated abruptly without any notice and without any meeting. She further added that the reason given regarding respondent's termination was retrenchment while the respondent was not involved in any retrenchment exercise nor notified. Ms. Mariamu further countered the respondent's argument that parties agreed to such kind of termination. She averred that this argument is not founded because the applicant was not involved at all. They thus prayed for the application to be dismissed.

In rejoinder Mr. Emmanuel Augustino while rejoining on the assertion that the decision of arbitrator Adam was not challenged timely he

reminded that the decision was interlocutory order which could not be challenged by revision. He referred to his previous **Revision Application No. 299 of 2018** which was filed to challenge the decision regarding condonation, but they were advised to withdraw it with leave to refile for being interlocutory order.

Regarding the impropriety of the decision of the deputy registrar to order refiling of revision, Mr. Emmanuel Augustino insisted that the blanket order of the deputy registrar granted a prayer which included leave to refile.

Rejoining on correction of error, Mr. Emmanuel submitted that **Rule 25 of G.N No.64 of 2007** concerns among others, situations where a party is incorrectly cited while **Section 90** concerns slip of error and clerical mistakes. Even Makanyaga's decision bears the same error. He thus prayed for the CMA award to be revised and set aside.

Having considered parties pleadings, submissions and the CMA record, I find two issues for determination. The first issue is **whether the applicant adduced good grounds for this Court to exercise its revisional power,** and the second issue is **what reliefs are parties entitled to.**

In resolving the **first** issue, the four grounds of revision listed in the affidavit will be addressed one after another in the same mode

adopted by the parties in their submissions.

To start with the **first** ground as to **whether the arbitrator was correct to grant condonation without sufficient cause**, the applicant asserted that condonation was granted without reasons and alleged the arbitrator of having extended time arbitrarily. On other hand the Ms. Mariam challenged the timeliness of the issue of condonation asserting that the fact that the condonation decision is dated 2018 and no extension of time has ever been granted to have any application against this decision, therefore, it was wrongly brought at revision stage in application which concerns the decision of Hon. Makanyaga. Alternatively, submitting on the substance of the validity of the condonation order, Ms. Mariam stated that the applicant was waiting for a copy of the decision of the High Court and this was the reason for delay and the Arbitrator found it to be a sufficient cause for condonation.

In answering whether condonation was properly granted, parties are debating on two points. The **first** one is based on the sufficiency of the reasons for condonation; the **second** point is challenging the appropriateness of raising the condonation issue at revisional stage while the **third** is on timeliness of raising the condonation issue. For convenience purposes and since the **second** and the **third** points

concerns matters of law, I will start to address them. Starting with appropriateness of raising the issue at the revisional stage, in rejoinder the applicant was of the view that condonation order was an interlocutory order which is not revisable but capable of being included in a revision or appeal. Whether condonation order was revisable or not, I got guidance from the provision of **Rule 50 of the Labour Court Rules, G.N No. 106 of 2007** which provides; -

> *"Rule 50; No appeal, review or revision shall lie on interlocutory or incidental decisions or orders unless such decision has the effect of finally determining the dispute."*

In the case **Tanzania Motors Services Ltd and Another v. Mehar Singh t/ a Thaker Singh**, Civil Appeal No. 115 of 2005, Court of Appeal of Tanzania, at Dodoma, (unreported) cited with approval the case of **Bozson v. Artrincham Urban District Council** (1903) 1KB 547 where it was held; -

> *"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final*

order; but if it does not, it is then, in my opinion, an interlocutory order".

It is obvious that an order to extend time does not finally determine a matter. After extension of time, the court proceeds with hearing on merit.

From the above cited provision and authorities, it is well established principle of law that for the decision to be revisable, it must have disposed of the rights of the parties or finalize the matter. In the matter at hand the arbitrator granted condonation and proceeded to determine the dispute on merit. In such circumstances such kind of decision cannot be treated as a final decision which disposed of the rights of the parties as opposed to a situation where condonation was rejected which would have rendered the decision revisable for having acquired a status of being a final decision. This being the case, an order for condonation falls under the unappealable or non-revisable orders falling within the prohibition of **Rule 50 of GN 106** cite supra. On this reason, it is appropriate to raise it as an issue at the appellate or revisional level if it aggrieved a party and not to file revision application solely to challenge it. The respondent argument that it is wrongly raised lacks merit.

Regarding the **second** point on the timeliness, it is already found

above that the order issued in **Labour Dispute No. CMA/DSM/ILA/R.1076/16** on 21st August 2017 was not final in allowing condonation and that it remains with the status of being interlocutory order. It can only be challenged at the revisional stage as part and parcel of the impugned proceedings. In this respect, limitation of time does not apply. It only forms an issue of the revision on the whole matter. The argument of time as well lacks merit.

Having determined the legal arguments on appropriateness of raising the condonation at the revisional state and the timeliness of the subject in the revision, now follows the first point as to whether there were sufficient reasons to allow condonation. According the applicant, the respondent did not account for all the days of delay in the CMA. On the other hand, the respondent stated that the respondent delayed lodging the application because she was waiting for the copies of the decision of the deputy registrar. The applicant did not dispute the argument that the respondent was waiting for copies of the decision of the registrar.

It is established that late supply of copies of decision to be acted upon, constitute sufficient ground for condonation. In this respect, it is on my view that the applicant had sufficient ground to be granted

condonation as she demonstrated that she was waiting for the said copies.

From the foregoing, having found that there was a reason adduced for condonation application the applicant's argument on this aspect lacks merit.

On the **second ground** of revision as to whether the Deputy Registrar had powers to grant order for re-filing of an application at CMA, I found it worthy to look at the challenged ruling issued by the Hon. Deputy Registrar in **Execution No. 93 of 2015.** At page 1 of the said ruling, it shows that the Decree Holder's Counsel prayed for the matter to be withdrawn intentionally to be instituted afresh on the reason that they sued the wrong party. That ruling speaks itself that the matter was withdrawn by the respondent's Counsel. It does not mean that the Deputy Registrar granted leave of refiling the matter at CMA. There was no way she could refuse the withdrawal. From the foresaid, this ground of revision holds no water.

On whether the CMA could hear the matter afresh instead of an application for correction of errors, Mr. Augustino Emmanuel submitted that since the respondent omitted the word Academy by filing the application against St. Mary International, he is of the view that the remedy was to seek extension of time so as to file

application for correction of errors in the CMA and not to refile a fresh application.

On the other side the respondent argued that the issue of a name was not clerical error but a mistake of suing a wrong part. He is of the view that the respondent sued a wrong party and therefore she had to start afresh to sue a proper party. According to the respondent's counsel, **Section 90 of the Employment and Labour Relations Act**, allows only correction of clerical mistakes, but there was no clerical mistakes but rather suing a wrong party and therefore the only alternative was to have a new matter before CMA.

To resolve the above contention, it is vital to give the meaning of the phrase ***'Clerical errors'*** against suing a wrong party. The *Black's Law Dictionary* defines a "clerical error" as one "resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." (*Black's Law Dictionary* 563 (7th ed.1999). It is on record that the respondent initially sued St. Mary's International and not St. Mary's International Academy. Basing on the above definition, I am of the view that the respondent sued the wrong party as a mistake done does not fall under clerical error but on suing a wrong party. In the case of **Tosijategi v. Tanzania Habours Authority,**

Civil Application No. 164 of 2006, Court of Appeal of Tanzania, (Unreported) as was cited in the case of **Msae Investment Co. Ltd v. Elius A. Mwakalinga,** Misc. Civil Application No. 470 of 2017, High Court of Tanzania, at Dar es salaam, (unreported) it was held: -

> *"The general principle of the law directs that; it is essential for the names of the parties either in a suit or in an application to be clearly stated. This is because such mistake in the names of the parties may be fatal and bring about some confusion. Hence an application bearing a non-existent respondent as in this case, may lead to fatal consequences because if the Applicant wins, an order of the court might not be executable to such a non-existing party."*

From the above authority it is established that for the order or award to be executed, one of the requirements is to have the proper party to whom the order is expected to be executed. The same applies in the application for **Execution No. 93 of 2015** which was withdrawn on the reason that the decree holder sued the wrong party. Basing on the above stated principle, it is obvious that suing a wrong party

can result into an inexecutable decree. For that reason, I am of the view that the respondent was right in filing the matter afresh and the CMA was right to hear the matter afresh instead of an application for correction of errors as a decree debtor was not a proper party.

On such findings the applicant's assertion that CMA lacked jurisdiction lacks merits on the reason that the respondent sued the wrong party, therefore the principle of res judicata cannot not apply.

Regarding the substance of the award, the arbitrator in his findings awarded 15 months as a remaining period under fixed term contract of two years. The applicant challenged the amount awarded by the arbitrator on the reason that the respondent's contract lapsed and all the terminal benefits were paid. The applicant blamed the arbitrator for not having taken into account all the exit arrangement in ending the respondent's employment relationship. On the other side the respondent maintained that the arbitrator was right in her findings in awarding 15 months as remaining period because the applicant was employed under fixed term contract of two years and she did not stay for more than two months in the said employment.

In establishing as to whether the arbitrator was right in awarding 15 months as the remaining period depends on the evidence adduced in the CMA. The respondent tendered a two years employment contract

as exhibit. The applicant had a duty not only to counter such evidence but also to produce the record of the respondent's employment including the appropriate contract if the tendered one was in dispute. I make reference to the provision of **Section 15 (6) of the Employment and Labour Relations Act, Cap 366 R.E 2019** which provides that; -

> *"15 (6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer."*

Basing on the above cited provision, the employer is placed on a duty of proving or disproving the employment status of an employee in case she failed to produce written contract or employee's particulars in any legal proceedings. In this application it is undisputed that the respondent was employed on 6th May 2000 on her first appointment, (see Exhibit H13) and was terminated on 15th February 2013 as per the letter of appointment and list of terminal benefits, which were admitted at CMA as Exhibit H-3 collectively. The applicant alleges that the employment contract lapsed. However, the applicant failed to

tender the last contract which existed amongst the parties for the Court to establish as to when it was supposed to end or expire. This is a weakness which is contrary to **Section 15 (6) of ELRA.** It supports the applicant's claim and the arbitrator's findings that the remained contractual period was 15 months from 15th February 2013 when the respondent was terminated to 6th May 2014 when the respondent's contract was supposed to end. This is calculated in consideration with her 1st appointment on 6th May 2000 subject to the fixed term contract of 2 years which was signed on 25th September 2000 (see the appointment letter and employment contract Exhibit H3 collectively).

I could not agree with the applicant that the contract lapsed because there was retrenchment exercise as alleged in the CMA. No evidence of disciplinary measures which resulted to the termination. I could not see the basis of the termination of the employment and there was any procedure complied with.

Since the applicant failed to prove the basis of termination, and a contract to counter the respondent's evidence in the CMA, then I am of the view that her claim that there were no 15 months could not stand, and the arbitrator was right in awarding 15 months as a compensation for the remained period.

In the upshot, it is my finding that the major issue as to **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award issued in Labour Dispute No. CMA/DSM/ILA/R.1076/16** is answered negatively.

From the above reasons the application for revision has no merits. I hereby uphold the CMA award and dismiss this application for revision for want of merit. Each party to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 27th day of October 2022.

KATARINA REVOCATI MTEULE
JUDGE
27/10/2022