

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

REVISION APPLICATION NO. 194 OF 2022

(Arising from the Ruling issued on 03/6/2022 by Hon. Kalinga, C, Mediator, in Labour dispute No. CMA/DSM/ILA/R.91/2020 at Ilala)

IDECOR GLAZING LIMITED 1ST APPLICANT
IDECOR DESIGN LIMITED 2ND APPLICANT

VERSUS

JUMA BAKARI 1ST RESPONDENT
ALOYCE NELSON MWANYINGA 2ND RESPONDENT
KING'ONYO IBRAHIM CHINGO 3RD RESPONDENT
SALIM DAWOOD ABDULHUSSEIN 4TH RESPONDENT
OMARY SALIM OMARI 5TH RESPONDENT
SAID MOHAMMED ISMAIL 6TH RESPONDENT
HUSSEIN M. MTALIKA 7TH RESPONDENT
AMIRI RAHIBU MKINDU 8TH RESPONDENT
MOHAMMED BAKARI TAO 9TH RESPONDENT
HASSAN ALLY OMARY 10TH RESPONDENT
MUK SAID HATIBU 11TH RESPONDENT

JUDGMENT

Date of the last Order: 28/11/2022
Date of Judgment: 5/12/2022

B. E. K. Mganga, J.

Brief facts of this application are that respondents were employees of the applicant. It happened that respondent terminated employment

contracts of the respondents. Aggrieved with termination of their employment, respondents filed the dispute before the Commission for Mediation and Arbitration (CMA) complaining that applicants terminated their employment unfairly. On 20th March 2020, applicant and the respondents settled the dispute before Hon. Kalinga, Mediator, that respondents should be paid TZS 7,160,000/= and that they should be reinstated on 15th April 2020. It is said that respondents were paid the said TZS 7,160,000/= but applicant failed to reinstate them, instead, applicants decided to retrench the respondents. Respondents refused to accept retrenchment, as a result, they filed Execution No. 192 of 2020. On 04th September 2020, the executing officer, ordered applicants to reinstate the respondents but applicants did not comply with that order. On 23rd October 2020, respondents filed an application at CMA for calculation of the amounts they are entitled to be paid after applicants have refused to reinstate them. On 30th November 2020, the mediator made calculations that respondents are entitled to be paid TZS 78, 794,075/=.

On 19th November 2021, applicants filed an application to set aside the said calculations. In the affidavit affirmed by Mohamedazim Karim, the director of the applicants, in support of the application to set aside the

exparte order, he deponed that applicants were not served with the application. In opposing the application, respondents filed the counter affidavit of Juma Bakari, who deponed that applicants refused to receive summons and that they are applying legal technicalities to escape liability. On 1st February 2022, the mediator granted the application and ordered applicants to file an application so that they can be heard interparty.

On 9th February 2022, applicants filed an application supported by the affidavit of Mohamedazim Karim praying to set aside the said exparte order. In his affidavit, Mohamedazim Karim deponed that applicants were not served with summons. In his counter affidavit, Juma Bakari opposing the application, refuted the claim by the applicants. On 3rd June 2022, Hon. Kalinga, C, Mediator, delivered a ruling dismissing the application by the applicants that applicants refused service.

Applicants were further aggrieved by the said Ruling hence this application. In the affidavit of Mohamedazim Karim, the director of the applicants, in support of the application he raised five grounds namely:-

- 1. That, the Mediator erred in law in determining the application by the respondents without serving the applicants hence denying the applicants right to be heard.*
- 2. That, the Mediator erred in law to grant an application that was already mediated to the conclusion.*

3. *That, the Mediator erred to hear the application by the respondent while the same was time barred.*
4. *That, the Mediator erred in law to dismiss the application to set aside the ex parte order.*
5. *That, the Mediator erred in law to determine the application by the respondents ex parte.*

Again, in resisting the application, respondents fronted the counter affidavit of Juma Bakari.

When the application was called on for hearing, Mr. Gilbert Mushi, learned advocate appeared and argued for and on behalf of the applicants while Juma Bakari, 1st respondent appeared and argued for and on behalf of the respondents.

Arguing the application, Mr. Mushi consolidated the 1st, 4th and 5th grounds together as the 1st ground and argued the 2nd and the 3rd grounds separately.

Arguing the 1st ground, Mr. Mushi submitted that on 20th March 2020 parties settled the dispute before Hon. Kalinga, Mediator, that respondents should be paid TZS 7,160,000/= and be reinstated on 15th April 2020. He added that respondents were paid the said money but applicants failed to reinstate the respondents, as a result, they decided to retrench the respondents. He went on that, respondents refused to accept

retrenchment, as a result, they filed Execution No. 192 of 2020 and that on 04th September 2020, the executing officer ordered respondents to be reinstated. He strongly submitted that, applicants reinstated the respondents and retrenched them on 15th April 2020 but respondents filed an application that was heard *ex parte* at CMA for calculations of the amount each was entitled. He concluded that on 03rd June 2022, the Mediator wrongly dismissed applicants' application to set aside *ex parte* calculation and cited the case of **Mohamed Nassoro v. Ally Mohamed** [1991] TZH18 to implore the court to grant the application.

Arguing the 2nd ground, Mr. Mushi submitted that, the Mediator was *functus officio* because parties entered settlement and that this Court ordered respondents be reinstated hence the Mediator had no power to make calculations. Counsel for the applicants cited the case of **Scolastica Benedict v. Martin Benedict** [1993] TLR 1 (CA) and **Karori Chogoro v. Waitihache Merengo**, Civil Appeal No. 164 of 2018 to support his argument that the Mediator was *functus officio*. He argued in the alternative that, even if assumed that CMA had powers to make calculations, that powers were reserved to the Arbitrator and not the Mediator. He cited this Court's decision in the case of **Suzana Mwanyava**

V. Cardinal Rugambwa Hospital, Revision No. 191 of 2022(unreported) to bolster his argument.

Arguing the 3rd ground, counsel for the applicants submitted that the Mediator erred to determine the matter that was time barred. He cited Section 90 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019], Rule 33(1) and (2) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007 and Rule 30(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 and submit that respondents were supposed to file the application within 14 days from the date the award was issued for correction of clerical mistake. He submitted further that, settlement between the parties was entered on 20th March 2020 but respondents filed the dispute on 23rd October 2020 after 7 months. He went on that; the Mediator was supposed to dismiss the application by the respondents because there was no application for condonation. To support his arguments, counsel for the applicants cited the case of **Ebrahim Haji Charitable Health Centre v. Jenifer Mlondezi & 3 Others**, Misc. Appl. No. 227 of 2016, HC (unreported). During his submissions, counsel for the applicants conceded that, in terms of Section 40(3) of Cap. 366 RE. 2019(supra), if employer

does not wish to reinstate the employee, must pay the employee 12 months salaries as compensation. He conceded further that, upon settlement being entered, and employers having refused to reinstate the respondents, the latter had an option of filing application for execution. He also conceded that, the settlement agreement did not state salary of each respondent and that there is no evidence proving that respondents were paid salary after being reinstated as agreed, to comply with the order of the Court. He added that, applicants do not contest the amount of salary that was payable to each respondent because that is the correct salary but that, the complaint by the applicants is that Mediator had no such powers of making calculations. He concluded that, there are two executions i.e., No. 192 of 2020 and 599 of 2020 both filed by the respondents and prayed the application be allowed.

Resisting the application, Mr. Juma Bakari, the 1st respondent submitted that on 15th April 2020 applicants directed respondents to report at work but when respondents reported, applicants refused to reinstate them. That, due to that refusal, respondents filed an application for execution before this Court but applicant refused service. He went on that, due to that refusal of service, the Deputy Registrar issued reinstatement

order to execute the settlement award. He submitted further that applicants have not complied with the order of reinstatement which is why calculations were made. I should point out albeit briefly that did not submit on CMA's functus officio and powers of the Mediator raised by counsel for the applicants. Understandably and for an obvious reason that he is a lay person.

In rejoinder, Mushi, had nothing new to add.

I have examined the CMA record and find that it is undisputed fact that on 20th March 2020 applicants and the respondents settled the dispute before Hon. Kalinga, Mediator, that respondents should be paid TZS 7,160,000/= and that they should be reinstated on 15th April 2020. It is also undisputed that respondents were paid the said TZS 7,160,000/= and that the parties signed a Settlement Agreement under Mediation Form (CMA F7) showing that applicants will pay the said amount to the respondents and reinstate the later on 15th April 2020.

When arguing the 1st ground, Mr. Mushi, learned counsel for the applicants submitted that applicants reinstated the respondents and retrenched them on 15th April 2020 but respondents filed an application that was heard ex parte at CMA for calculations. Respondents submitted

that applicants refused to reinstate them which is why they filed an application for execution and an order was issued that applicants should reinstate the respondents. From submissions of the parties, it is clear that there is no revision application filed against the order of the Mediator relating to the said settlement agreement or this court relating to reinstatement and in fact, applicants have not challenged that order. It was correctly conceded by counsel for the applicants that, in both the settlement agreement and the order of this court in execution application, amounts payable to the respondents were not stated. It was also correctly conceded by counsel for the applicants that upon refusal to reinstate the respondents, applicants were supposed to comply with the provisions of section 40(3) of Cap. 366 R.E. 2019(supra). It was submitted by counsel for the applicants that respondents were reinstated on 15th April 2020 and that they were paid their salaries and thereafter were retrenched. With due respect to counsel for the applicants, as an officer of the court, should at all times, be professional and desist to mislead the court. Submissions that respondents were reinstated is not born out of evidence on record. In his affidavit, Mohamedazim Karim, the director of the applicants, in support of this application or applications filed at CMA, did not state that respondents

were reinstated, paid their salaries, and thereafter terminated. Therefore, submissions by Mr. Mushi from the bar, are not evidence hence cannot be considered. I therefore hold that the order of reinstatement has not been complied with hence the 1st ground has no merit.

Counsel for the applicants cited the provisions of Section 90 of the Cap. 366 R.E. 2019(supra), Rule 33(1) and (2) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007 and Rule 30(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 and submit that respondents were supposed to file the application within 14 days from the date the award was issued for correction of clerical mistake and that they filed an application for calculation of the amounts they were entitled to while out of time. With due respect to counsel for the applicants, in the application at hand, there was no clerical mistake to be corrected for the said provisions to be invoked. These provisions and ***Mlondezi's case*** (supra) were cited out of context as they are not applicable. I therefore dismiss the 3rd ground.

It was submitted by counsel for the applicants that the Mediator was functus officio. With due respect, there is no order that was initially made by the Mediator in relation to calculation of the amounts payable to the

respondents after applicants has refused to comply with the order of reinstatement for this court to hold that the Mediator was functus officio. The cases of ***Scolastica Benedict*** (supra) and ***Karori Chogoro*** (supari) are irrelevant to the application at hand.

It was submitted by counsel for the applicant that the Mediator has no power to make calculations because that power is reserved to the arbitrator and cited Counsel for the applicants cited this Court's decision in the case of ***Suzana Mwanyava's case*** (supra). I agree with him on that point because the court of Appeal in the case of [Barclays Bank T. Limited vs AYYAM Matessa](#), Civil Appeal No. 481 of 2020 [2022] TZCA 189 held that:-

"...Truly, under the ELRA the jurisdiction of a mediator as the title dictates, is to mediate, the process which does not include to dismiss and to decide a complaint. That would no doubt be a general rule. Under exceptional circumstances as it is in the provision under discussion, the mediator is empowered to dismiss the complaint if the referring party fails to appear and decide the same if the party against whom the referral is made fails to appear".

From submissions of counsel for the applicants, it is clear that he was of the view that respondents cannot file at CMA an application for calculation for the amount each is entitled. In other words, the award cannot be executed because there were no calculations. It is my view that

the said award is executable. It is my further view that, since there is an order of reinstatement that has not been complied with by the applicants, the executing officer has powers to make calculations as it was held by the court of Appeal in the case of [Hassan Twaib Ngonyani vs TAZAMA Pipe Line Limited](#), Civil Appeal No. 2011 of 2018 [2022] TZCA 88 that the executing officer has jurisdiction. In the said case, the Court of Appeal in allowing the appeal held *inter-alia*:-

"...the executing officer enjoys exclusive jurisdiction to deal with any question relating to execution, discharge and satisfaction of the decree. Where the resolution of any of the questions requires ascertainment of controversial factual issues, the executing court is entitled, under section 38(2) of the CPC even to convert execution proceedings into a suit. In our view, therefore, in so long as the claim is captured by the decree, whether expressly or constructively, it is within the power of the executing court to compute the same"

Again, in the case of ***Karata Ernest and Others V. The Attorney General***, Civil Revision No. 10 of 2010 (unreported), the Court of Appeal held:-

" Although ordinarily the trial court has a duty to determine the quantum which the judgment debtor is bound to pay under the decree, where it has left out that question open for consideration subsequently, the executing court has jurisdiction to determine the quantum under this section on the issue."

Guided by the two cited Court of Appeal decisions, I direct that the executing officer should make calculations respondents are entitled to in

terms of section 40(3) of Cap. 366 R.E. 2019 (supra) to execute settlement agreement between the applicants and the respondents because applicants has refused to reinstate the respondents.

For the foregoing, I partly allow the application because Mediators has no powers to do what was done in the application at hand. I therefore order and direct that parties should appear before the Deputy Registrar, the executing officer, who will make calculations of the amount each respondent is entitled to.

Dated in Dar es Salaam on this 05th December 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 05th December 2022 in chambers in the presence of Juma Bakari, the 1st Respondent but in the absence of the Applicants.



B. E. K. Mganga
JUDGE