

THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION APPLICATION NO. 307 OF 2020

BETWEEN

TANZANIA TELECOMMUNICATIONS CO. LIMITED APPLICANT

AND

ERNEST NANGI RESPONDENT

RULING

Date of last order: 11/03/2022

Date of Ruling: 11/3/2022

B. E. K. Mganga, J

In 2002, the abovenamed applicant entered into a two years fixed contract with the respondent in the position of Advertising and Promotions Manager. Upon expiry the contract was renewed. In 2007, respondent was appointed to the position of Head Business Unit, the position he served up to 2009. On 12th July 2009, he was appointed to the position of Acting Chief Marketing and sales Officer. In 2012, applicant opened internal investigation on marketing and advertisement contracts due to mismanagement allegations of the said marketing contracts. On 26th July 2014, employment relationship between the two came to an end. Respondent thereafter filed Labour complaint No. CMA/DSM/ILALA/R.740/14/417 before the Commission for Mediation

and Arbitration (CMA) at Ilala claiming to be paid TZS 1,000,000,000/= being compensation for unfair termination and general damages. On 7th day of December 2017, Alfred Massay, Arbitrator issued an award in favour of the respondent and ordered the applicant to pay TZS 242,518,560/= to the respondent within 14 days as he found that respondent was unfairly terminated.

Applicant was aggrieved with the said award as a result, she filed this application for revision. The notice of application was supported by an affidavit sworn by Richard Moshi, the senior Human Resources Officer of the applicant. Resisting the application, respondent filed his counter affidavit and the notice of opposition. On 22nd November, 2021, in terms of Rule 43(1) of the Labour Court Rules, GN. No. 106 of 2007, respondent filed the notice of representation showing that he has appointed Ndurumah Keya Majembe, advocate and Deusdedit Madeleke Luteja, advocate to appear and represent him in this application. The said notice of representation was received by the court on 26th November 2021.

When the application was called for hearing on 29th November 2021, Ms. Adelaide Ernest, State Attorney, for the applicant entered appearance but none of the advocates appointed by the respondent

appeared in court. The application was adjourned to 9th February 2022 for hearing. On the latter date, Ms. Ernest State Attorney, for the applicant appeared but one Martine Sangila, advocate appeared, allegedly holding brief of Ndurumah Keya Majembe, counsel for the respondent. The application did not take off for two reasons i.e., (i) there was no CMA record and (ii) respondent was not duly represented. The application was therefore adjourned for hearing on 1st March 2022 but on this none of the parties appeared because it was cause listed for hearing on 8th March 2022 in the on-going special sessions and parties were duly notified. Again, on 8th March 2022, only Ms. Ernest, State Attorney entered appearance because counsel for the respondent didn't and without notice to the court. I adjourned the matter to 11th March 2022 and directed service to be effected to counsel for the respondent.

On 11th March 2022, when the matter was called for hearing, Adelaide Ernest, and Lucian Garet, both State Attorneys for the applicant entered appearance while Mr. Martine Sangila, advocate appeared for the respondent. Ms. Ernest, State Attorney for the applicant submitted the summons showing that it was received at Fortis Attorneys by Martin Sangila. Martine Sangila submitted that he is working at Fortis Attorneys with Ndurumah Majembe Advocate and Deusdedith Luteja Advocate. Ms.

Ernest submitted that counsels for the respondent were duly served but they have failed to appear. She therefore prayed to proceed ex parte.

The court asked Martine Sangila if he had right of audience before the court and his reply was that he is holding brief of Mr. Majembe advocate with instruction to proceed with hearing of the application. He submitted further that Mr. Majembe travelled to Mwanza on 10th March 2022 according to the information he received from Mr. Luteja advocate but that reasons for that travel were not disclosed to him. When the court asked Mr. Sangila advocate as to why Mr. Luteja has not entered appearance, he replied that Mr. Luteja advocate has not shown up in office on 11th March 2022. He conceded that Mr. Luteja, advocate is aware that the application is scheduled for hearing on 11th March 2022. When asked as to why Mr. Luteja advocate has not shown up in office and or court, Mr. Sangila, advocate, stated that he knows no reason thereof. He conceded that on 9th February 2022 when he appeared in court, the matter did not proceed because he did not have right of audience as a result it was adjourned to 1st March 2022. He submitted that he notified both Mr. Ndurumah Majembe Advocate and Deusdedith Luteja Advocate that the matter was adjourned for hearing on 1st March 2022 but that nobody appeared on that date.

When asked by the court whether, the instruction given to him by Mr. Majembe advocate gives him power under the law to proceed with hearing of the application, Mr. Sangila advocate submitted that it doesn't. he conceded that in terms of Rule 43(1) of the Labour Court Rules, GN. No. 106 of 2007, an advocate who appears in court must file a notice of representation. He went on that the said Rule must be read together with section 56(c) of the Labour Institutions Act [Cap. 300 R. E. 2019]. He therefore conceded that it is the requirement of the law for the parties to file the notice of representation with full names and address. He submitted further that Mr. Majembe and Luteja, advocates were appointed by the respondent to represent him in this application. He concluded that the said advocates have no power to delegate their power to him to appear and represent the respondent in the application at hand.

In rejoinder, Ms. Ernest, State Attorney reiterated her submissions that leave should be granted to proceed *ex parte* because counsel for the respondent does not want to abide by the law or enter appearance.

I have heard submissions by Ms. Ernest State Attorney on behalf of the applicant and Mr. Sangila advocate purporting to represent the respondent, and examined the court record and find that it is true, Mr.

Sangila advocate is not among the advocates that were appointed by the respondent to appear and argued this application on his behalf. As rightly conceded by Mr. Sangila, advocate, he does not have right of audience. Rule 43(1) of the Labour Court Rules, GN. No. 106 of 2007, read together with section 56(c) of the Labour Institutions Act [Cap. 300 R. E. 2019] requires the party to the application to sign the notice appointing an advocate who will appear in court on his/her behalf. The said notice of representation must be filed to the court. In my view, it is the duly signed notice by the party to the proceedings that gives the court assurance that the advocate appearing before it was duly appointed. In other words, the notice signed by the party to the application is evidence that the party has consented for the person named in the notice to appear and argue the application. Therefore, the advocate or any other party has no power to appear in court on behalf of the party to the application without the notice of representation showing his or her name.

Since the name of Mr. Sangila, advocate does not appear in the notice of representation he cannot allowed to argue on behalf of the respondent. It was initially submitted that Mr. Sangila, advocate was holding brief of Mr. Majembe, advocate with instruction to proceed but later, rightly in my view, upon reflection, submitted that the instruction

from Mr. Majembe advocate did not cloth him with power to appear and make submissions on behalf of the respondent. The reason is clear because both Majembe and Luteja, advocates were delegated powers by the respondent to appear and argue the application on his behalf and therefore the two advocates have no power to further delegate that power to Mr. Sangila advocate.

In fact, in the case of ***NIC Bank Tanzania Limited v. Princess Shabaha Company Limited & 2 Others, Civil Appeal No. 248 of 2017*** (unreported), had an advantage of discussing the effect of Mr. Mnyele advocate giving instruction to Mr. Msengezi advocate to appear and handle the case of the appellant without instruction from the appellant. The Court of Appeal held: -

*"There is no evidence either to show that Mr. Msengezi received instructions from the appellant to proceed with the conduct of the case. Likewise, there is no evidence to suggest that the appellant withdrew instructions from Mr. Mnyele upon a proper notice to her. **In our view, Mr. Msengezi had to be instructed first by the appellant before receiving the instruction to take over the matter from Mr. Mnyele...the two advocates had no mandate to give instructions to each other without involving the appellant. In the existing circumstances, there is no doubt that the principle of right to be heard was not observed when the trial court entered default judgment on account of the absence of Mr. Msengezi who had no instructions from the appellant...we are of the firm view that the learned trial judge ought to have directed the appellant to appear in person and not allowing an advocate***

without proper instructions to appear and represent her under an arrangement which she did not approve..."

Guided by the above Court of Appeal decision, and in absence of the notice of representation duly signed by the respondent authorizing Mr. Sangila, advocate to appear on his behalf, I hold that Mr. Sangila, advocate have no right of audience before the court. Since advocates who were duly authorized by the respondent have failed to appear though duly served, I have no option other than to accept the prayer by the State Attorney and order the application to proceed exparte. The application cannot be kept being adjourned for non-appearance of counsels for the respondent. I take this stance being aware that the court must control the case and the parties and not to be controlled by the parties to the case. Counsels for the respondent have failed to enter appearance without justifiable reasons. In my view, this may amount to professional misconduct. I should point in a passing that respondent may take action against the said advocates if he so wishes, because they have abandoned his case after being duly appointed.

Now back to the application at hand, having found that there is no appearance on behalf of the and while being alive that there is no CMA record, the court asked the State Attorney whether applicant is in the position to reconstruct the record or not because CMA record is not

traceable at CMA. The court informed the State Attorney that it has received an affidavit sworn by the in charge of CMA at Dar es Salaam stating that they have made all efforts to trace the said CMA file without success and that it is untraceable.

Responding as to whether applicant can reconstruct the record or not, Ms. Ernest State Attorney for the applicant submitted that she is not. She went on that at CMA they were depending on what the arbitrator was recording as such; applicant have nothing much to help the court to reconstruct the record. She went on that in absence of the CMA record, the court cannot determine the issues raised by the applicant in the affidavit in support of the notice of application. State Attorney concluded by praying that CMA proceedings should be nullified and the award arising therefrom be quashed and set aside and order retrial.

I have considered the submissions of the State Attorney that applicant cannot reconstruct the record and taken into consideration the affidavit filed before this court showing that all efforts to trace the CMA record has failed. It is true a submitted by the State Attorney that all legal issues raised in the affidavit in support of the application cannot be resolved in absence of the CMA record. Not only legal issues but also,

factual issues cannot be determined without causing injustice to either party. I am alive to guidance issued by the Court of Appeal in the case of **Robert Madololyo v. the Republic, Criminal Appeal No. 486 of 2015** (unreported) as to what should be done if the record of the court is missing. It is my view, as evidenced by the affidavit sworn by the in charge of CMA at Dar es Salaam and the submissions by the State Attorney that the record is missing and further that the party is unable to reconstruct the record, the only option available is to nullify CMA record as correctly submitted by the State Attorney and order trial de novo.

For the foregoing, I hereby nullify CMA record, quash, and set aside the award arising therefrom and order trial de novo. I further order that parties should go back to CMA so that the dispute can be heard without delay.

Dated at Dar es Salaam this 11th March 2022.




B.E.K. Mganga
JUDGE