THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 364 OF 2021

(Originating from the ruling of the Commission for Mediation and Arbitration, Hon. H. Makundi, arbitrator, in Labour dispute No. CMA/PWN/BAG/135/018 dated 18th October 2019)

BETWEEN

RUNDANU COMPANY LTD ..... APPLICANT

AND

FADHILI RAMADHANI LOCO ..... RESPONDENT

JUDGMENT

Date of Last Order: 18/03/2022
Date of Judgment: 21/04/2022

B.E.K. Mganga, J.

The respondent entered into oral agreement with the applicant as supervisor for construction of an industry of the applicant. During their employment relationship, applicant alleged that respondent stole 1,344 bags of cement valued at TZS 18,144,000/=, 27 tons of iron bar valued at TZS 43,200,000/=, one water tank valued at TZS 2,800,000/= all property of the applicant valued at TZS 64,144,000/=. It is said that,

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based on that allegation, applicant suspended the respondent and thereafter filed a criminal case at police.

Respondent was unhappy with suspension as a result, he filed Labour complaint No. CMA/PWN/BAG/135/02/019 at Bagamoyo claiming to be paid TZS 25,300,000/= as salary arrears from December 2017 to November 2018, because he was not paid as the criminal case that was filed by the applicant was pending in court. Together with CMA F1, respondent filed application for condonation Form (CMA F2) showing that the dispute arose on 30th December 2017 and further that, he was late for 10 months. It happened that applicant did not enter appearance, as a result, the dispute was heard exparte. On 20th June 2019, Hon. H. Makundi, arbitrator issued an exparte award ordering the applicant to pay the respondent TZS 25,300,000/= being salary arrears.

On 2nd August 2019, applicant filed an application at CMA praying to set aside the said exparte award. The application by the applicant was made under section 87(5)(a) and (b) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] supported by an affidavit sworn by Tecla Masawe, the Managing Director of the applicant. In resisting the application, respondent filed the notice of opposition, counter affidavit and a notice of preliminary objection *inter-alia* that, the

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application is hopelessly time barred. On 18th October 2019, Hon. H. Makundi, arbitrator, having heard submissions from both sides, delivered a ruling sustaining the preliminary objection that the application by the applicant was time barred. Applicant was aggrieved with that ruling hence this application for revision. In the affidavit of Hassan S. Ruhwanya in support of the notice of application, raised nine (9) issues to wit:-

(i) *Whether the Commission was right for holding that one Ashura Juma was mandated to receive service on behalf of the company or its director without proof.*

(ii) *Whether the Commission was proper to disregard the fact that the knowledge of the exparte award came to the mind of the director on 22nd July 2019.*

(iii) *Whether the Commission was right for holding that the service was properly effected.*

(iv) *Whether the Commission was right for shifting the burden of proof to the applicant on the fact alleged by the respondent.*

(v) *Whether it was proper for the Honourable arbitrator to hold that the applicant did not deny having recognized the receiver of the document.*

(vi) *Whether the ruling of the CMA militates against the right to be heard.*

(vii) *Whether the Commission was right for failure to follow the principles of overriding objectives.*

(viii) *Whether it was right for the Commission to rule that the application was time barred.*

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(ix) Whether it was proper for the Honourable arbitrator for failure to critically evaluate, analyse and determine submissions.

Respondent filed both the notice of opposition and the counter affidavit resisting the application.

By consent of the parties, the application was disposed by way of written submissions.

In his written submissions, Mr. Hassan S. Ruhwanya, advocate for the applicant argued grounds number (i), (ii), (iii), (v), (viii), and (ix) together by criticizing the arbitrator mostly for what was done in relation to the exparte award. He argued that the dispute arose in Bagamoyo, but summons and the award were served to the authorized personnel at Tabata which is outside the CMA jurisdiction without adhering to procedures of serving summons to persons out of jurisdiction provided for under section 24(1) and (2) of the Civil Procedure Code [Cap. 33 R. E. 2019]. Counsel for the applicant relied on the provisions of the Civil Procedure Code arguing that there is no similar provision in the Labour statute. Counsel for the applicant submitted further that arbitrator erred by determining the merit of the application instead of disposing the preliminary objection raised by the respondent. Counsel argued that the

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CMA ruling is tainted with illegalities. Counsel complained further that the ruling relating to condonation was not served to the applicant.

On ground (iv), Mr. Ruhwanya, advocate submitted that it was the respondent who suggested that Thecla Massawe is the leader in the company, that is why, the said Tecla Massawe was served with company documents. Counsel submitted that applicant was not served, but service was done to an individual. He submitted that the arbitrator erred to shift burden to the applicant on facts alleged by the respondent.

On ground (vi) counsel for the applicant submitted that the ruling dismissing the application by the applicant closed the doors for the applicant to be heard, hence violated the principle of right to be heard enshrined under Article 13(6)(a) of the United Republic of Tanzania Constitution.

Responding to the written submission by the applicant, Mr. Japhet Eliaamini Mmuru, counsel for the respondent, submitted that applicant filed the application to set aside the exparte award out of time. He submitted that in terms of Rule 30 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007, applicant was supposed to file an application within 14 days from the date she became aware of the said exparte award. He went on that, at CMA, applicant submitted

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from the bar that she became aware of the exparte award on 2nd July 2019 but that was not in her affidavit hence not evidence. Counsel cited the case of ***Prime II Co. Ltd and Another v. Kamaka Co. Ltd, Civil Revision No. 66 of 2020***, High Court(unreported) to support his argument. Counsel further cited the case of ***Felix Pantaleo Mselle & 8 Others v. Tanzania Commission for Science and Technology, Civil Application No.60/17 of 2018, CAT*** (unreported) and submitted that, at CMA, applicant was supposed to state the date she was served with the exparte award but she did not.

On service of the award to the applicant, counsel for the respondent submitted that there is no much contention because applicant admits that service was done to Tecla Masawe and not to the applicant. Counsel for the respondent submitted that, in terms of Rule 6(2)(a) and (b) of the Labour Institutions (mediation and Arbitration) Rules, GN. No. 64 of 2007, service was done properly to Tecla Massawe and Ashura Juma. He submitted further that the award was served to Tecla Massawe on 2nd July 2019 and received by Ashura Juma on behalf of the addressee. Counsel argued further that, since Tecla Massawe deponed that she is the Managing Director of the applicant, then, it was proper for her to be served with the documents of the applicant.

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In rejoinder, Mr. Ruhwanya, counsel for the applicant maintained that applicant became aware of the exparte award on 22nd July 2019 and filed an application to set aside the said exparte award on 2nd August 2019 and implored the court to do substantive justice. Counsel for the applicant argued that allowing the application will not cause injustice to the respondent.

Having heard submissions and examined the CMA record, I have found that there is jurisdictional issue relating to condonation. It was submitted by counsel for the applicant that applicant was not served with the ruling granting condonation to the respondent. Counsel for the respondent did not submit as whether condonation was granted, or the said ruling was served to the applicant. In my careful examination of the CMA record, I have found that the application for condonation was not determined by the mediator. The CMA record shows that on 19th February 2019 the application was scheduled for hearing application for condonation, but the applicant did not appear as a result, it was scheduled for hearing on 4th March 2019. On the later date, applicant did not enter appearance hence the arbitrator issued the following order:-

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"Amri. Shauri kusikilizwa upande mmoja (exparte hearing) na uamuzi kutolewa kwa mujibu Kanuni ya 28(1)(b) Tangazo la Serikali Na. 67 /2007. Pia, hoja ya awali iliypo ya kuja nje ya muda itaamuliwa wakati wa kuangalia Ushahidi wote katika suala hili. Hii ni kwa mujibu wa Kanuni ya 23(9) T.S. na. 67/2007. Ushahidi utatolewa tarehe 22/3/2019 saa 4.00 Asbh."

The record is silent as to what transpired on 22nd March 2019 because there is no endorsement in the file. The CMA record shows that on 21st May 2019, the dispute proceeded exparte by the arbitrator recording evidence of the respondent. The above quoted order tells that the dispute was heard without condonation.

On 20th June 2019, arbitrator issued an exparte award. In the said award, the arbitrator granted condonation to the respondent and proceeded to examine evidence by the respondent and concluded that respondent was entitled to the relief claimed. In the award, the arbitrator correctly pointed out:-

"Kabla ya kuingia kwenye shauri la msingi kumekuwa na maombi ya kuleta shauri nje ya muda kupitia hati ya maombi CMA F2 pamoja na hati ya kiapo. Maombi haya yanapaswa kushughulikiwa kabla ya shauri la msingi..."

The arbitrator was correct that an application for condonation should be determined before hearing the dispute on merit. But in the application at hand, the arbitrator received evidence of the respondent before granting condonation. This was an error. At the time the

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arbitrator was receiving evidence of the respondent, he was not clothed with jurisdiction. What the arbitrator did in this application is granting condonation retrospective. In other words, CMA clothed itself with jurisdiction retrospectively at the time of composing the award. This is not proper because whatever was done prior pronouncement that condonation has been granted is a nullity because the arbitrator had no jurisdiction. Since an order that condonation was granted was pronounced in the exparte award dated 20th June 2019, the arbitrator had no jurisdiction to record evidence of respondent on 4th March 2019. Legally, there is no evidence that was adduced after the grant of condonation on 20th June 2019 and therefore there is no base for issuing an exparte award. I therefore associate myself with the decision of this court in the case of **Ally Mzee Moto v. TANESCO,** Revision No. 255 of 2008, wherein it was held that

> "Disputes *referred late cannot be processed unless the CMA had condoned the delay... After receiving the respondent's* (applicant) *application, the CMA should have served the same ... as per rule 29(5) then proceeded to hear and determine it under rule 29(10) or (11). That did not happen in this case;* ***thus, the CMA was not properly seized with jurisdiction when***

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it processed the respondent's referral filed out of time, without condonation. "

For that reason, I find no reason to determine the remaining issue. I hereby allow the application. The CMA proceedings and decisions thereof are hereby quashed and set aside. The CMA record should be remitted back to CMA for the application for condonation to be determined by another arbitrator within Twenty-One (21) days and proceed in accordance with the law.

Dated at Dar es Salaam this 21st April 2022.

B.E.K. Mganga
JUDGE

Judgment delivered on this 21st April 2022 in the presence of Hassan Ruhwanya, Advocate, for the applicant and Japhet Mmuru, Advocate, for the respondent.

B.E.K. Mganga
JUDGE

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