

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

**REVISION APPLICATION NO. 428 OF 2021**

(Arising from ruling delivered on 17<sup>th</sup> September 2021 by Hon. Kalinga, C, Mediator in Labour dispute No.  
CMA/DSM/KIN/880/20 at Kinondoni)

**BETWEEN**

**SAMEER ESMAIL ..... APPLICANT**

**AND**

**KONE PASNO ..... RESPONDENT**

**JUDGMENT**

Date of last order: 30/3/2022  
Date of Judgment: 28/4/2022

**B. E. K. Mganga, J.**

This is an application for revision filed by Sameer Esmail, the applicant, against Kone Pasno, the respondent. Historical background of this application briefly is that employment relationship between the two started on 10<sup>th</sup> January 2015. It is said that on that date, the two entered oral contract and agreed that the respondent will be employed as a watchman to guard a newly bought unoccupied house of the applicant. It

is said that on 14<sup>th</sup> December 2020, applicant terminated employment of the respondent. Aggrieved with termination, respondent filed the dispute before the Commission for Mediation and Arbitration (CMA) complaining that applicant terminated his employment unfairly because neither reason for termination was given nor procedures for termination were followed. At CMA, respondent claimed to be paid TZS 5,000,769/= being 12 months' salary compensation, one month salary in lieu of notice, one month salary leave, and 14 days salary worked for December 2020. It happened that applicant did not enter appearance as a result the matter proceeded exparte. On 16<sup>th</sup> April 2021, Hon. Kalinga, C, arbitrator, delivered exparte award in favour of the respondent ordering the applicant to pay TZS 330,000/= being one month salary in lieu of notice, TZS 154,000/= being salary for 14 days worked for December 2020, TZS 3,960,000/= being 12 months' salary compensation and TZS 444,231/= being severance pay for five years all total amounting to TZS 4,888,231/=.

Respondent thereafter filed execution application No. 153 of 2021 before this court and notified the applicant that the same was scheduled on 17<sup>th</sup> June 2021. On 5<sup>th</sup> May 2021, Joseph Rashid, on behalf of the applicant collected the exparte award from CMA. On 11<sup>th</sup> May 2021, applicant filed an application at CMA to set aside the exparte award. In the

affidavit in support of the application, applicant stated that his non-appearance was not deliberate but was because he was unaware. He stated further that, both CMA F1 and summons to appear were sent to the SRS (the Company) which applicant had no relationship with, as a result, he did not receive them.

The application to set aside the said *exparte* award was heard *exparte* as it was said that respondent refused service. On 17<sup>th</sup> September 2021, Hon. Kalinga, C, Mediator, having considered submissions made on behalf of the applicant, delivered a ruling dismissing the application by the applicant. The mediator held that, applicant refused to sign the summons to appear in hearing the dispute on ground that the name is not his. The mediator dismissed the claim that summons and CMA F1 were served to SRS because applicant did not file those CMA F1 and summons received by the said SRS company and concluded that applicant had knowledge of existence of the dispute but chose not to enter appearance.

Applicant was further aggrieved by the said ruling hence this application for revision. In the affidavit in support of the notice of application, applicant repeated what he stated in the affidavit he filed at CMA seeking to set aside the *exparte* award. In the said affidavit, applicant advanced two legal issues to be considered by this court namely:-

- 1. Whether it was proper for the arbitrator to award ex parte award in favour of the respondent without considering and satisfying herself as per the standard rules and procedures adhered to regarding service of summons.*
- 2. Whether it was proper for the arbitrator to deliver the award without notifying the applicant on the date of the delivery of the ex parte award.*

This time respondent was served with the application and filed a counter affidavit resisting the application.

When the application was called for hearing, Mr. Anwar Katakweba, learned counsel appeared and argued for and on behalf of the applicant while Mr. Sospeter Ng'wandu, the Personal Representative, appeared and argued for and on behalf of the respondent.

Arguing the application on behalf of the applicant, Mr. Katakweba, Advocate, submitted that the arbitrator erred to proceed ex parte without proof that applicant was served and further that, on the date of the award, applicant was not notified. He submitted that the arbitrator erred in holding that applicant refused to accept summons. Counsel submitted that arbitrator did not consider Rule 6(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 that provides matters to be considered as proof of service. Counsel for the applicant submitted further that, Rule 7(1) of GN. No. 64 of 2007 (supra) requires proof of mailing by registered post by the other party, telefax transmission report and that if

sent by hand, a copy of a receipt signed by or on behalf of the other party and a statement confirming service signed by a person who delivered a copy of the document were supposed to be filed as proof of service. He argued that if at all applicant refused service, an affidavit was supposed to be filed and that, summons only showing that the other party refused service, does not empower the arbitrator to proceed *exparte*.

Counsel for the applicant submitted that applicant was supposed to be notified the date of award because it is his right and cited the case of Cosmas ***Constructions Company Ltd V. Arrow Garments Ltd [1992] TLR 127*** and the case of Serengeti ***Breweries Ltd V. Joseph Boniface, Civil Appeal No. 150 of 2015*** (unreported) to support his argument. He concluded that applicant was denied his constitutional right to be heard which is a fundamental right and that the effect thereof is nullification of CMA proceedings, quash and set aside the *exparte* award and order interparty hearing.

Resisting the application, Mr. Ng'wandu, Personal Representative of the Respondent submitted that procedures for serving the applicant were followed. He submitted further that, the respondent and the Street Leader tried to serve applicant but the later refused service. He went on that summons were duly signed showing that applicant refused service three



times thereafter the dispute was heard exparte. He submitted further that applicant refused to sign the summons notifying him the date of the award.

In rejoinder, Mr. Katakweba, submitted that the report from the Street leader that applicant refused service is not sufficient and argued that respondent was supposed to file affidavit or proof by courier service.

After my careful examination of the affidavit in support of the application, I found that at paragraph 3.4 applicant deponed that on 5<sup>th</sup> May 2021 he wrote to the commission to peruse the file and on perusal, he noted that respondent filed the dispute against him on 15<sup>th</sup> December 2020 and attached the said letter as MEL-3. In the verification clause, applicant verified that all matters including what is contained in 3.4 are true to the best of his knowledge. However, in examination of the said letter MEL-3, I found that it was authored and signed by Joseph Rashid, an advocate from KKB Attorneys at Law and not the applicant himself. I therefore asked parties to address the court on competence of this application and the one that was filed at CMA because applicant filed a similar affidavit.

Responding on the issue raised by the court, Mr. Katakweba, counsel for the applicant submitted that it is true that in paragraph 3.4 of the affidavit applicant stated that he wrote a perusal letter. But the letter was written by Joseph Rashid, Advocate from KKB Attorneys. Therefore, the

letter was not written by applicant. In the verification clause applicant stated that all what he stated in the affidavit is according to his personal knowledge. Counsel for the applicant conceded that what was stated relating to perusal of the CMA file was an information from his Counsel. Counsel conceded that the verification clause was defective. Counsel submitted further that, the only offensive paragraph is 3.4 that should be expunged. Mr. Katakweba, counsel for the applicant conceded further that in paragraph 4 in the application to set aside the exparte award, applicant stated that he received information (sms) from No. +255 754291636 from Kone Pasno's representative. The same sms has been referred in this application showing that it was received from the respondent's personal representative.

On his part, Mr. Ng'wandu, Personal Representative of the Respondent submitted that he is the one who was representing the respondent at CMA and that, the said phone No. +255 754291636 is not his. Mr. Ng'wandu submitted that the said phone belongs to Mr. Temu Mwambete, an employee of this Court. He argued that, the verification clause is defective because the affidavit contains false information and cannot be acted or relied upon by this Court. He therefore prayed the application be struck out.

In rejoinder, Mr. Katakweba, counsel for the applicant submitted that Applicant was informed by Temu Mwambete, an employee of this Court. He conceded further that, the Court cannot act on false information and that the same false information was given at CMA.

I will start with the issue raised by the court on competence of the application both before this court and at CMA. I have considered submissions of the parties and I agree with them that, the verification clause is defective making the whole affidavit in support of the notice of application before the court to be defective. In terms of Rule 24(1) of the Labour Court Rules, GN. No. 106 of 2007, the application before the court is by the notice of application. The Notice of Application must be supported by an affidavit as provided for under Rule 24(3) of GN. No. 106 of 2007 (supra). Since the affidavit in support of the notice of application is defective, the application before the court is incompetent.

As noted above, a similar affidavit was filed at CMA. In terms of Rule 29(2) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 an application at CMA must be by notice, and in terms of Rule 29(4) of the said GN., the notice must be supported by an affidavit. The



affidavit that was filed at CMA in support of the application was therefore defective. In other words, there was no application at CMA.

It is my view, that applicant has lied in the verification clause purporting to show that all facts are to the best of his knowledge while some were not. This, in my view, is serious and cannot be taken lightly. The court of Appeal had an advantage of discussing the importance of the verification clause in the case of ***Jamal S. Mkumba and another v. Attorney General, Civil Application No. 240/01 of 2019*** (unreported) by referring to its earlier decision in the case of ***Lisa E. Peter v. Al- Hushoom Investment, Civil Application No. 147 of 2016*** (unreported) wherein it quoted with approval the Indian case of ***A.K.K. Nambiar v. Union of India (1970) 35 CR 121*** which explained the importance of a verification clause in affidavit as follows:

***"The reason for verification of affidavits is to enable the court to find out which facts can be said to be proved on the affidavit evidence or rival parties' allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for allegations. In essence verification is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification clause, affidavits cannot be admitted as evidence". (Emphasis is mine)***

The Court of Appeal went on that:-

*"Basing on the above cited cases, verification clause is one of the essential ingredients of any valid affidavit which must show the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs."*

In Mkumba's case(supra) the Court of Appeal held that the remedy for that defect will be decided depending on circumstance of each case. In my view, the defect in the circumstances of the application at hand, makes the whole application incompetent as it goes to the genuineness and authenticity of allegation by the applicant. Since the same information was given at CMA, the arbitrator acted on a defective affidavit. In short, there was no application at CMA. I hereby nullify CMA proceedings relating to application to set aside an exparte award and the ruling dated 17<sup>th</sup> September 2021, arising from that application. Having so held, I find that there is nothing to be revised. More so, I have found that this application is incompetent.

Dated at Dar es Salaam this 28<sup>th</sup> April 2022.



B.E.K. Mganga  
**JUDGE**

Judgment delivered today 28<sup>th</sup> April 2022 in the presence of Anwar Katakweba, advocate for the applicant and Sospeter Ng'wandu, the personal representative of the respondent.



A handwritten signature in black ink, appearing to read 'B.E.K. Mganga'.

B.E.K. Mganga  
**JUDGE**

Labour Court TZ.