

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

REVISION APPLICATION NO. 453 OF 2020

BETWEEN

SUMAIYA FAST FOOD.....APPLICANT

VERSUS

MLOSI SHABANI ALMASI.....RESPONDENT

JUDGEMENT

15th March 2022 & 28th April, 2022

K. T. R. MTEULE, J.

This Revision application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Disputes No. CMA/DSM/MIS/25/2020 and Labour Dispute No. CMA/DSM/237/18 dated 17th October, 2020 and 26th December, 2018 Delivered by Hon. Ngaruka, O. and G. Simba respectively. **SUMAIYA FAST FOOD**, the Applicant herein is praying for the orders of the Court in the following terms:-

1. That this Honorable Court be pleased to call for the records of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/MIS/25/2020 and Labour Dispute No. CMA/DSM/237/18 dated 17th October, 2020 and

26th December, 2018 Delivered by Hon. Ngaruka, O. and G. Simba respectively and examine the legality, correctness and or appropriateness thereof.

2. That, having examined the same, this Honourable Court be pleased to revise and set aside the said decisions entered by the Commission for Mediation and Arbitration in the said complaints in favour of the respondent.
3. That, any other orders (s) this Honourable Court may deem just and fit to grant.

I find it appropriate at this point, to give in brief, the facts as grasped from the CMA records, affidavit and counter affidavit filed by the parties, leading to this application. On 10th July, 2017 the respondent was employed by the applicant as Restaurant Waiter. The dispute among them arose on 30th January, 2018 when the respondent was terminated on alleged unfairness in terms of reasons and procedure.

Aggrieved by the termination decision, the Employee filed the matter at the CMA on 9th March, 2018 claiming to have been unfairly terminated and for payment of his terminal benefits. After the determination of the application, which was heard ex-parte, the Commission decided in the Employee's favor. The Employee decided

to execute the ex parte award by filing in this Court, the Execution No. 679 of 2019.

On 11th June, 2020 the Order of warrant of attachment was issued by Hon. Ng'humbu, Deputy Registrar. Following the Execution Order, the applicant filed application at CMA to set aside the ex-parte award. The Employer's efforts were fruitless as the Application at the CMA was dismissed for lacking merits. As a result, on 4th November, 2020 the Applicant filed the present application seeking for this Court to revise the CMA decisions.

Along with the Chamber summons, the applicant filed an affidavit sworn by one Hamis Athumani Mahayu the Sole Proprietor running a business name, styled as SUMAIYA FAST FOOD, the Respondent herein. After explaining the chronological facts leading to this application as already stated above, the applicant added that, in 2018 he entered into an arrangement with the Respondent who undertook to run a chips cooking business at the Applicant's restaurant on consideration of paying the Applicant an amount of 200,000 per month. He stated further that within one month of running the chips business the Respondent left the and never came back until when the applicant received a notice from the Court Broker on 24th June, 2020.

He proceeded to depone that he decided to challenge the ex-parte award by filing an application to set aside the award since it was decided without affording the applicant with any right to be heard. He further stated that the arbitrator erred in law by entertaining labour Dispute CMA/DSM/237/18 while it was filed out of time.

The Respondent challenged the application through his sworn counter affidavit. The deponent in the counter affidavit alleged that the applicant was aware of the existence of Labour Dispute No. CMA/DSM/ILA/R.237/18 but willfully refused several summonses issued to the applicant.

This application was disposed of by a way of oral Submissions. The Applicant was represented by Bakari Juma, Advocate whereas The Respondent appeared in person.

Having adopted the contents of the affidavit as part of the submission, Mr. Bakari submitted on three grounds. Starting with the **first**, Mr. Bakari submitted that the respondent filed the matter out of time contrary to Rule 10 (1) of GN. No. 64 of 2007 which demands all disputes concerning unfair termination to be instituted at the Commission within 30 days. He stated that this time limit was not observed in this application, the dispute arose on 30th January, 2018

but the matter was filed in the CMA on 9th March, 2018 that means there was a delay of more than 7 days.

According to Mr. Bakari the arbitrator admitted that the dispute was filed on 9th March 2018 but he failed to dismiss the application contrary to Section 3 (1) of the Law of Limitation Act which require all matter filed out of time to be dismissed.

He added that the issue of jurisdiction of the Court is crucial and it can be raised at any stage even at appellate or revisional level. To support his contention, Mr. Bakari for the applicant cited two cases including the case of **Tanzania Revenue Authority v. Tango Transport Company Ltd.**, Civil Appeal No. 84 of 2009, Court of Appeal of Tanzania, at Arusha, (unreported). On that basis he is of the view that the CMA was wrong in entertaining the matter which was time barred.

On the **second** issue as to whether the service of the summons was properly initiated, Mr. Bakari argued that the applicant is a business name and not a Company, therefore any summons from the CMA should have been sent to the owner of the business who is the deponent of the affidavit in this application. He averred that neither document nor summons was served to the owner of the fast-food

business contrary to Rule 6 of the Mediation and Arbitration Rules, GN. No. 64 of 2007. In such circumstance he is of the view that the right to be heard was not observed contrary to the principle of natural justice.

With regard to the **third** issue as to whether the Commission erred in determining the matter against a party who does not have capacity to sue or be sued. Mr. Bakari argued that Sumaiya Fast Food is not a legal entity but just a business name and the owner of the same is Hamis Athuman Mahayo, in this respect, CMA erred in law in determining the matter against it. Therefore, the respondent ought to have filed the dispute against Hamis Athuman Mahayo who is the owner of Sumaiya Fast Food.

Mr. Bakari thus prayed for the application to be revised and the award to be set aside.

In reply the respondent argued that the matter was not time barred since it was admitted when it was filed.

On the second issue regarding service of summons, the respondent argued that the applicant was served two times via postal method and the service was received by Director Shady Athuman, who is the

sister of the owner of restaurant Mr. Mahaya Hamis but the applicant failed to appear, leading to ex parte award against the applicant and the execution order before this Court.

In reacting to the third ground regarding the capacity of being sued or to sue Mr. Mlosi, the Applicant, submitted that he did not comply with employment procedure, so he deserved to be sued. He added that since he is the owner, he should respond a claim against SUMAIYA FAST FOOD.

Having considered and analyzed the contents of the affidavit and counter affidavit, the submissions made by both parties and the CMA record I find that the issues for determination are:-

- i) Whether CMA had a jurisdiction to entertain the impugned award with reference No. CMA/DSM/ILA/R.237/18.
- ii) Whether the Applicant has a legal capacity of being sued or to sue?
- iii) Whether the summons was properly procured by the respondent?
- iv) Whether the arbitrator was right in dismissing application for setting aside ex-parte award with reference No. CMA/DSM/MIS/25/2020.

Starting with the first issue the applicant contended that respondent's application was filed out of time for not being filed within 30 days from when the dispute arose on the ground that his dispute fall under the ambit of Rule 10 (1) of GN. No. 64 of 2007 which requires dispute for unfair termination to be filed within 30 days. On other hand the respondent maintained that his application was filed within a time since it was admitted. I have gone through the arbitrator's award, the issue of time was not addressed by the arbitrator. Since the matter was heard ex parte, this justifies the stated dates extracted from respondent's opening statement and CMA Form No.1. From that, the question before this Court is whether respondent's dispute regarding unfair termination was filed within a time for the CMA to have jurisdiction to entertain the same. Rule 10 (1) of GN. No. 64 of 2007 provides that:-

"any dispute about fairness of employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate."

As articulated in the above provision, the respondent's application

ought to be filed within 30 days from the date of termination. Since the issue of time is a matter of jurisdiction which goes to the root of the case, I concur with Mr. Bakari by citing the case of **Tanzania Revenue Authority v. Tango Transport Company Ltd.**, Civil Appeal No. 84 of 2009, Court of Appeal of Tanzania, at Arusha (unreported) which discussed the issue of jurisdiction belatedly raised and canvassed even on appeal by the parties or the Court suo moto, as it goes to the root of the trial. In such circumstance I am of the view that the arbitrator had a duty of considering the issue of time factor. At page 1 paragraph 2 of the award the Arbitrator stated that the dispute arose on 30th January, 2018 and the matter was filed before CMA on 09th March, 2018 that means there was a delay of 9 days from the date of decision. This draws a conclusion that the dispute in the CMA was filed out of time and without a leave of the court.

What follows now is what is the remedy for a dispute filed out of time without a leave of the court. In the case of **Tima Haji v. Amiri Mohamed Mtoto and Another**, Civil Revision No. 61 of 2003, High Court of Tanzania, at Dar es Salaam (unreported) at page 18 it was

held that:-

"Since the application for revision was filed long after the expiry of sixty days which is the period of limitation, the first preliminary objection is upheld and accordingly, the application for revision is dismissed."

Again, in the case of **TOICO Ltd. v. Tanzania Revenue Authority**, Misc. Cause No. 108 of 2003, High Court of Tanzania, at Dar es Salaam, (unreported) where it was held that:-

"For these reasons, I agree with Mr. Primi for the respondent that this application is time barred. Therefore, I uphold his preliminary objection and dismiss this application with costs."

From the above cited authority since the respondent filed his application before CMA not within a time as prescribed under Rule 10 (1) of GN. No. 64 of 2007 the same ought to be addressed by the arbitrator by dismissing the application.

From the findings in the first issue, this application can be finally disposed. I find no need to labor much on the remaining issues.

Basing on that legal basis, I agree with Mr. Bakari for the applicant

that the application with reference No. CMA/DSM/ILA/R.237/2018 before CMA was time barred. Therefore, I quash and set aside the CMA award in the said Labour Dispute No. CMA/DSM/MIS/R.237/2018. Equally, by setting aside the award, the decision in Labour Dispute No. CMA/DSM/MIS/25/2020 which originated from the award cannot stand, it is quashed and set aside. Each party to the suit to take care of their own cost. It is so ordered.

Dated at Dar es Salaam this 28th day of April, 2022.




KATARINA REVOCATI MTEULE

JUDGE

28/04/2022