

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

REVISION APPLICATION NO. 340 OF 2020
(Originating from Labour Dispute No. CMA/DSM/MISC/ 35/19)

BETWEEN

**BLACKSEA IMPORT EXPORT &
PRODUCE CO. LTD..... APPLICANT**

VERSUS

SEMENI ALLY SHECKY.....RESPONDENT

JUDGMENT

Date of Last Order: 16/11/2021

Date of Judgment: 28/01/2022

I. Arufani, J.

This judgment is for the application filed in this court by the applicant beseeching the court to revise the ruling delivered by the Commission for Mediation and Arbitration (hereinafter referred as the CMA) dated 29th July, 2020. The impugned ruling was in respect of the application filed in the CMA by the applicant urging the CMA to set aside its ex parte award issued in favour of the respondent and against the applicant's favour. The applicant is urging the court to revise and set aside the impugned ruling basing on the following

grounds:-

- i. The arbitrator did not consider at all whether the preliminary objection was properly before the Commission.*
- ii. The arbitrator wrongly ruled as to when in law the time started to run against the applicant.*

The application was supported by the affidavit of Sefa Kuzu, Managing Director and Shareholder of the applicant. While in opposing the application, the respondent's counter affidavit was filed in the court. When the matter came for hearing the applicant was represented by Mr. Egidi S. M. Mkoba, Learned Advocate and the respondent was represented by Mr. Andrew Michael Ngwada, Personal Representative. Following the prayer made to the court by the respondent and granted, the application was argued by way of written submission.

Submitting in support of the application the applicant's counsel prayed to adopt the affidavit in support of the application to form part of his submission. He stated in relation to the first ground that, the arbitrator wrongly considered the objection. He stated the issue at stake was whether the applicant became aware of the ex-parte

award on 9th October, 2019 as alleged by the respondent or on 16th December, 2019 as alleged by the applicant.

The applicant's counsel submitted that is a question of fact and not a point of law. To bolster his argument, the counsel for the applicant referred the court to the case of **Mukisa Biscuits Manufacturing Co. Ltd. V. West End Distributors** (1966), EA 696 where it was stated that, preliminary objection is a domain of points of law. He also cited the case of **Soimbatsu Village Council V. Tanzania Breweries Ltd. & Another**, Civil Appeal No. 105 of 2011 as cited in the case of **Mwanachi Insurance Co. Ltd. v. The Commissioner for Insurance**, Misc. Commercial Cause No. 2 of 2016 (both unreported) where it was stated in the earlier case that:-

"Where a court is to investigate facts, such an issue cannot be raised as preliminary objection on a point of law ... It will treat as a preliminary objection only those points that are pure law, unstained by facts".

The counsel for the applicant insisted that, the Hon. Arbitrator erred in law to treat the issue as a point of law and proceed to consider it while the same is purely a point of fact.

He argued in relation to the second ground that, the applicant was aggrieved by the arbitrators finding that the applicant became

aware of the ex parte award on 9th October, 2019. He argued the referred date is when the applicant was served with the High Court summons for execution proceedings and not the date, he became aware of the impugned ex parte award. He submitted that, upon receiving the court summons, as a corporate body the applicant took initiatives of hiring services of a law firm who wrote a letter dated 12th December, 2019 to the CMA asking for leave to peruse the CMA file. He stated that, on 16th December, 2019 is when the applicant became aware of the ex parte award. He contended that; it was a material error to the merit of the case as the arbitrator treated the High Court summons as an award of the commission. Apart from perusal of the CMA's file there is no proof on how the applicant was made aware of the award.

It was submitted by the counsel for the applicant that, if the Hon. Arbitrator was to consider the preliminary objection, as per Rule 30 (1) of the GN. No. 64 of 2007 which provides for 14 days limit of filing an application to set aside an arbitration award from the date when the applicant became aware of the ex parte award, which is 16th December, 2019 and filed the application in the CMA on 20th December, 2019 he would have found the application was timely filed

in the CMA. He thus prayed the court to revise and set aside the CMA's award.

In response to the applicant's averments, the respondent prayed to adopt his counter affidavit to form part of his submission. The respondent submitted that, the preliminary objection raised against the applicant's application was proper and was based on limitation of time which is a question of law touching jurisdiction of the CMA to entertain the application. He submitted that, even if he would have not raised the said point of preliminary objection still the Hon. Arbitrator would have struck out the application for being filed in the CMA out of time.

It was further submitted by the respondent that, the applicant's reasons for failure to file his application in the CMA within the time proscribed by the law have no legal basis. He stated the applicant admits in his submission that, he received the summons for Execution Application No. 664 of 2019 on 9th October, 2019. He argued that, after the applicant being served with the court summons, he became aware of the ex parte award and submitted he had a duty to make follow up of his case.

He went on submitting that, the applicant argued after being served with the court summons, she started looking for a legal firm and on 12th December, the legal firm secured wrote a letter of perusal of file of the CMA which was almost 64 days from when the applicant became aware of the ex parte award issued by the CMA. The respondent argued the said reason could have been the good reason for seeking extension of time to file the application to set aside the ex parte award in the CMA out of time and not to file the application for setting aside in the CMA out of time and without condonation to file the application out of time. At the end the respondent prayed for dismissal of the application.

In his rejoinder, the applicant's counsel reiterated his submission in chief. He also distinguished the case of **Tanzania China Friendship Textile. Co. Ltd.** (Supra) as the issue determined in that case was on pecuniary jurisdiction and not limitation of time. He insisted on the prayers he made in his submission in chief.

After consideration of the contesting submission of the parties and after going through the record of the matter and the relevant laws the court has found the issues to be determined in this

application are whether the point raised by the respondent at the CMA was a preliminary objection and whether the application to set aside the CMA's ex-parte award was filed at the CMA out of time.

Starting with the first issue the court has found it was stated in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd.** (supra) that:-

"... a preliminary objection ... raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if the fact has to be ascertained or if what is sought is the exercise of the judicial discretion...."

The court has also found when the Court of Appeal of Tanzania was determining the issue of what amounts to a pure point of law in a preliminary objection the Court stated clearly in the case of **Karata Ernest & Another V. Attorney General**, Civil Revision No. 10 of 2010 that, one of the obvious examples of point of law in a preliminary objection is a plea of limitation of time to file a matter in the court or tribunal. It was also stated in the case of **Musanga Ng'andwa V. Chief Japhet Wanzagi and 8 others** (2006) TLR

351 that:-

"Preliminary objection is an expression used in our jurisdiction to refer to objection to the jurisdiction of the court, a plea of limitation and the like. It contains a point of law, which if argued as a preliminary point may dispose of the suit. A preliminary objection cannot be raised if any fact has to be ascertained, that is it cannot be based on unascertained factual matters."

From the definition of the term preliminary objection given in the above cited cases the court has found the point of objection raised by the respondent in the matter filed at the CMA by the applicant and determined by the arbitrator, met the criterion set in the above cited legal authorities. The court has arrived to the above finding after seeing that limitation of time is a point of law provided under the law. Its establishment is made by looking into the duration provided under the law and the pleadings filed in the court by the parties or the evidence available in the record of a matter. There is no need of requiring evidence out of the record of the matter to determine a matter is within or out of time.

That being the meaning of the term preliminary objection the court has considered the argument by the counsel for the applicant that the point of law raised by the respondent at the CMA was not a

preliminary objection as it could have not been established without requiring evidence to prove when the applicant became aware of the ex parte award but failed to side with the said argument. The court has arrived to the above finding after seeing that, although the applicant argued they were not aware of the ex parte award issued against them by the CMA but it is stated in the affidavit supporting the application that, the applicant was served with the summons of the application for execution filed in this court by the respondent and after engaging an advocate they were notified there was an ex parte award which had been issued by the CMA against them.

To the view of this court the said facts were sufficient enough to determine whether the matter was filed at the CMA within or out of time. The stated view takes the court to the second issue which asks whether the application to set aside the ex parte award was filed in the CMA within or out of time. The court has found an application to set aside the exparte award, is governed by Rule 30 (1) of the Labour Institutions (Mediation and Arbitration) GN. No. 64 of 2007 which states as follows:-

"An application by a party to correct or set aside an arbitration award in terms of Section 90 of the Employment and Labour Relations Act, shall be made

within fourteen days from the date on which the applicant became aware of the arbitration award.”

The wording of the above cited provision of the law is very clear that, a party wanted to set aside an ex parte award is required to lodge the application at the CMA within fourteen days from the date of becoming aware of the ex-parte award. The court has found the counsel for the applicant argued that, the applicant became aware of the ex parte award on 16th December, 2019 after being informed by their advocate who perused the record of the CMA. On the other hand, the Hon. Arbitrator found the applicant was aware of the ex-parte award on 9th October, 2019 after being served with the High Court summons requiring them to appear in the application for execution filed in this court by the respondent.

The court is of the same view as of the arbitrator that, the applicant became aware of the ex parte award on 9th October, 2019 when they were served with the summons to appear in the court in the application for execution filed in this court by the respondent. The court has arrived to the above view after seeing the summons is self-explanatory that the execution emanated from the CMA's award. Under that circumstances the applicant would have not kept quite for

such a long time without making a follow up to know what was the source of the said ex-parte award and what legal step they would have taken.

Again, the court has found the applicant contended that, having obtained the summons they started searching for the legal assistance but he didn't state when he secured the lawyer to assist them in their case. It was only stated when the lawyer wrote a letter to the CMA seeking to peruse the file and the date when the applicant was informed by the lawyer that there was ex-parte award which had been issued by the CMA against them.

Although I fully respect the applicant's right to representation but that right does not preclude him from adhering to the requirement of the law. It is also a trite law that searching for legal assistance has never been a good cause for the delay. That makes the court to find the applicant's allegation lacks merit. They ought to have acted diligently or file in the CMA an application for condonation of time to file the application to set aside the ex parte award out of time. The above discussion caused the court to come to the settled view that, the application to set aside ex parte award filed in the CMA on 20th December, 2019 while the applicant was served with

summons to appear in this court in the application for execution of the said ex-parte on 9th October, 2019 the application was hopelessly out of time hence the Hon. Arbitrator did not error in sustaining the point of preliminary objection raised by the respondent.

In the premises the court has found the application for revising the award of the CMA filed in this court by the applicant is devoid of merit. Consequently, the application of the applicant is hereby dismissed in its entirety for being devoid of merit and the ruling of the CMA is accordingly confirmed. It is so ordered.



I. Arufani

JUDGE

28/01/2022

Court: Judgement delivered today 28th day of January, 2022 in the presence of Ms. Kambibi Kamugisha, Advocate holding brief of Mr. Egidi Mkoba, Advocate for the Applicant and in the presence of Mr. Ayoub Edwin Mligo, Personal Representative for the Respondent. Right of appeal to the Court of Appeal is fully explained to the parties.



I. Arufani

JUDGE

28/01/2022