THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 100 OF 2021

BETWEEN

LETSHEGO BANK (T) LIMITED ..... APPLICANT

AND

CHACHA SAMSON MWITA ..... RESPONDENT

JUDGMENT

Date of last order: 7/03/2022
Date of Judgment: 23/3/2022

B.E. K. Mganga, J

On 19th March 2013 applicant employed the respondent as Client Officer. In the course of their employment relationship, applicant promoted the respondent to the position of Branch Manager. In the course of the same employment, it happened that their employment relationship went sour, as a result, on 8th April 2019, the applicant felt that the respondent breached responsibility policy. Due to that, applicant served the respondent with disciplinary charge that the latter has breached responsibility policy. Respondent denied the charge. On 15th April 2019, applicant served the respondent with a notice to attend the disciplinary hearing. On 18th 2019, respondent attended the said disciplinary hearing and its outcome was released on 6th May 2019 when

the respondent's employment was terminated due to breach of the applicant's responsibility policy.

Respondent was dissatisfied with the said termination, as a result, on 13th May 2019 he filed Labour dispute No. CMA/DSM/ILA/381/19 before the Commission for Mediation and Arbitration henceforth CMA at Ilala praying to be reinstated on ground that termination of his employment was unfair both substantively and procedurally. It happened that when the dispute was schedule for hearing, respondent did not enter appearance on 4th November 2019, 2nd December 2019, and 28th January 2020 consecutively. Due to the said non-appearance, applicant prayed for dismissal of the dispute for want of prosecution. On 28th January 2020, Msina, H.H., arbitrator, granted the prayer by the applicant and dismissed the dispute for want of prosecution.

On 18th February 2020, respondent filed an application for restoration of the dispute that was dismissed for want of prosecution. The affidavit in support of the application was sworn by Mr. Frank Chacha, counsel for the respondent. In his affidavit, Mr. Chacha deponed that he failed to enter appearance on 2nd December 2019 because he was sick. He deponed further that his failure to enter

appearance on 28th January 2020 was due to traffic jam that was caused by heavy rainfall.

Applicant filed the counter affidavit sworn by Angelist Misanya, her principal officer, opposing the application. In the counter affidavit, the deponed stated that the opening statement contains mobile phones and emails for communication that could have been used by the respondent to communicate his predicament to the applicant and the arbitrator before issuing a dismissal order. The deponent stated further that the application for restoration was not timely filed.

On 5th February 2021, Msina, H.H., arbitrator, having heard submissions by the parties, delivered a ruling restoring the dispute. In the said ruling, the arbitrator held that the dispute was dismissed due to negligence of counsel for the respondent and that it will be unfair to deny the respondent right to be heard due to negligence of his counsel. Applicant was aggrieved with that ruling, hence this application. In the affidavit of Angelist Misanya, the principal officer, in support of the notice of application, raised three grounds namely:-

1. *That the honourable arbitrator having found that the respondent has had not adduced sufficient reasons for no-appearance, erred in law in ordering restoration of the referral.*

2. *That the honourable arbitrator's decision is not supported by evidence on record.*
3. *That the arbitrator raised suo moto during writing of the award an issue of negligence of the advocate and proceeded to decide without hearing the parties.*

Respondent filed both the notice of opposition and a counter affidavit opposing the application. In the counter affidavit, respondent stated that in granting the application for restoration of the dispute, arbitrator judiciously exercised discretionary powers.

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

In his written submissions in support of the application, Mr. Makaki Masatu, learned counsel for the applicant, arguing the 1st ground submitted that respondent did not show sufficient cause for non-appearance on 28th February 2020, the date on which the dispute was dismissed. Counsel for the applicant cited the case of ***Mary Daniel v. National Housing Corporation, Civil Application No. 505 of 2016,*** CAT (unreported) to support his argument that respondent was supposed to show sufficient cause for non-appearance. Counsel for the applicant submitted that traffic jam was not a good cause for non-appearance.

On the 2nd ground, that arbitrator's decision was not supported by evidence on record, Mr. Masatu, learned, Counsel for the applicant submitted that, allegations of negligence of counsel for the respondent were not pleaded in the affidavit in support of the application for restoration of the dispute at CMA. Counsel for the applicant submitted that, the arbitrator erred in law by relying on negligence of counsel for the applicant which was not pleaded hence not evidence on CMA record.

On the 3rd ground, counsel for the applicant submitted that the arbitrator raised the issue of negligence of counsel for the respondent in the cause of composing the award without affording the applicant right to be heard. Counsel for the applicant argued that, that is contrary to the law and cited the Court of Appeal decision in the case of ***Kluane Drilling (T) Ltd v. Salvatory Kimboka, Civil Appeal No. 75 of 2006*** (unreported) to support his argument. Counsel for the applicant submitted that negligence of advocate cannot be a sufficient cause for the court to exercise its discretionary power. Counsel for the applicant cited the Court of Appeal decisions in the cases of ***Umoja garage v. national Bank of Commerce [1997] TLR 109*** and ***William Shija V. Fortunatus Masha [1997] TLR 213*** to support his argument and prayed the application be granted.

Mr. Frank Chacha, counsel for the respondent, in his written submissions raised a preliminary objection that the CMA decision is not appealable in terms of section 74(1) of the Civil Procedure Code [Cap. 33 R.E. 2019] because it is interlocutory. He cited the case of ***Israel Solomon Kivuyo v. Wayani Langoyi and Naishooki wayani [1989] TLR 140*** to support his argument.

Responding to the 1st ground of application advanced by the applicant, Mr. Chacha, counsel for the applicant submitted that, *"the non-appearance of advocate in the case is due to discretions of the courts in the same day of the case"*. Briefly as it that argument, I have, admittedly, failed to understand what exactly counsel for the respondent meant in this submission.

On the 2nd ground i.e., that the arbitrator's decision is not supported by evidence on record, counsel for the respondent submitted that the decision is supported by evidence and that there were reasons to support that non-appearance was not caused by negligence.

On the 3rd ground relating to the complaint that the arbitrator raised *suo moto* the issue of negligence of an advocate during composition of the award and that did not afford the parties right to be heard; counsel for the respondent submitted that, in dispensation of

justice, the court is entitled to raise any issue *suo moto*. Counsel for the respondent concluded by praying that the application be dismissed for want of merit.

In rejoinder submission, Mr. Masatu, counsel for the applicant, responding to the preliminary objection raised by counsel for the respondent in his written submissions, submitted that, the preliminary objection has been improperly raised as there is no leave sought by the respondent and granted by the court. He argued that the issue of the order being interlocutory was not pleaded by the respondent in his pleadings. Counsel for the applicant cited High Court (at Iringa) decision in the case of ***Henrick Solomon Lupembe and Another v. the Deputy Minister of Agriculture and 4 Others, Misc. Civil Application No. 08 of 2020***, (unreported) to support his argument.

Counsel for the applicant submitted that counsel for the respondent missed the gist of the 3rd ground and went on that, raising an issue *suo moto* is not bad if parties are afforded right to be heard before the matter is decided. Counsel for the applicant reiterated that, negligence of advocate was not pleaded by the respondent and that applicant was not afforded right to be heard.

I should start with the issue of interlocutory raised by counsel for the respondent in his written submissions and complaint by counsel for the applicant that the same was not pleaded to by the respondent. I have examined both the notice of opposition and the counter affidavit filed by the respondent in opposition of this application and find that the same was not raised. I have found also that, there is neither notice of preliminary objection filed nor leave of the court sought and granted. It is my view that, the preliminary objection was raised from the blue without following procedures. I am alive to the position that certain preliminary objections on point of law specifically the ones touching the jurisdiction of the court, can be raised at any stage. But the preliminary objection raised by counsel for the respondent in his written submission in this application is not amongst. Invitation by the respondent to the court to deal with un-procedurally raised preliminary objection is an enticement that the court of law should ignore the law relating to procedure and turn itself into Kangaroo court. That solicitation is unacceptable. I have considered facts of this application and grounds raise by the applicant and I am of the view that, acceptance of preliminary objection in the way it was raised, I afraid that it may leave doors open to judicial or quasi officers to ignore the law and exercise their discretionary powers, improperly or unfairly, knowing that doors

will be closed against the other party, on pretexts that the matter is interlocutory. I therefore join hands with my learned brother (F. N. Matogolo, J) in ***Lupembe's case*** (supra) for not entertaining a preliminary objection raised during written submissions and without leave of the court.

Going back to the grounds of application, as pointed out herein above, in the affidavit in support of the application for restoration of the dispute that was dismissed for want of prosecution at CMA, counsel for the respondent raised to grounds namely that, on 2nd December 2019 he (counsel for the respondent) failed to enter appearance because he was sick. I should point albeit briefly that, no evidence was adduced at CMA to prove that counsel for the respondent was sick. It was also not proved that it was the said sickness that caused him not to enter appearance. Counsel for the respondent deponed further that on 28th January, 2020, the date the dispute was dismissed for want of prosecution, he failed to enter appearance due to traffic jam that was caused by heavy rainfall. It is a trite law that a party making application for restoration of a matter that has been dismissed for want of prosecution has to show that there was sufficient cause for non-appearance on the date the dismissal order was issued. Now, the issue

is whether, respondent adduced evidence at CMA proving that there was sufficient cause for non-appearance. As pointed hereinabove, the reason advanced by counsel for the respondent for the said non-appearance on 28th January 2020 was that it was due to traffic jam that was caused by heavy rainfall. In my view, this is not a sufficient ground because counsel for the respondent was supposed to foresee and use another alternative or else, he was supposed to give information to the other party and the arbitrator. It was not stated by counsel for the respondent how it happened the said traffic jam and rainfall to be selective affecting only himself and not the arbitrator and the applicant who managed to attend at CMA ready for hearing the dispute. The court of Appeal in the case of ***Phares Wambura and 15 Others v. Tanzania Electricity Supply Company Limited, Civil Application No. 186 of 2016 (unreported)*** had an advantages of dealing with a similar issue as whether traffic jam justifies non-appearance. The Court of Appeal (Levira, JA) in ***wambura's case*** (supra) held:-

> *"I wish to observe once that traffic jam is not and has not been a special circumstance justifying no-appearance of the parties before the Court".*

Guided by the above decision of the Court of Appeal, and as I have pointed out hereinabove that, there was no evidence that was

adduced showing how rainfall selectively affected and prevented the counsel for respondent alone from appearing at CMA but the said rainfall allowing chance to both the arbitrator and the applicant to attend. I find no logic in the traffic jam and rainfall ground as cause for respondent's counsel non-appearance on 28th January 2020. I therefore allow this ground.

In the 2nd ground of revision counsel for the applicant argued that there was no evidence on record showing that counsel for the respondent was negligent and in the 3rd ground that the issue of negligence of respondent's counsel was raised by the arbitrator at the time of composing the award and that parties were not afforded right to be heard on that issue. Counsel for the respondent submitted that there was evidence on record and further that the arbitrator was entitled to raise the issue in order to dispense justice between the parties. With due respect to counsel for the respondent, I have examined the affidavit in support of the application filed at CMA seeking to restore the dispute that was dismissed for want of prosecution and find that nothing was deponed that counsel for the respondent was negligent. The said affidavit is the only evidence that was placed before the arbitrator in determination of the application for restoration of the dismissed dispute

for want of prosecution. The said affidavit was sworn by Mr. Frank Chacha, who incidentally is the same counsel who filed written submissions in this application opposing the application by the applicant. Submission made on behalf of the respondent that counsel was negligent is admission by the said Frank Chacha, advocate that he did not discharge properly his duties as an advocate of the respondent. In other words, counsel himself admit to be negligent, which in my view, may amount to professional misconduct. I am not sure whether, counsel knows the effect of that submission in relation to professional conducts as an advocate and the duty he owes to his client especially when his client will opt to take an action against him. But for now, I will not go further.

Apart from the foregoing, I agree with both Mr. Masatu counsel for the applicant and Mr. Chacha, counsel for the respondent that in dispensation of justice, the court can *suo moto* raise an issue that is key for determination of the dispute. I am in further agreement with Mr. Masatu counsel for the applicant that in raising the issue *suo moto*, the court has to afford parties right to be heard. This is the position taken by the Court of Appeal in the case of ***Margwe Erro and 2 others v. Moshi Mohalulu, Civil Appeal No. 111 of 2014*** (unreported), ***Scan-***

Tan Tours Ltd v. The Registered Trustees of the Catholic Dioces of Mbulu, Civil Appeal No. 78 of 2012 (unreported), ***Mire Artan Ismail and Another v. Sofia Njati, Civil Appeal No. 75 of 2008*** (unreported) and ***Kluane's case*** (supra). In ***Kluane's case*** (supra) the Court of Appeal quoted its earlier decision in ***Njati's case*** (supra) as follows:-

"we are of the considered view that generally a judge is duty bound to decide a case on the issue on record and that if there are other questions to be considered they should be placed on record and parties be given an opportunity to address the court on those questions".

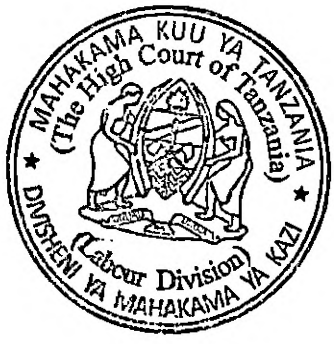
In the application at hand, the issue of negligence of advocate for the respondent was raise by the arbitrator at the time of composing the award and was not placed before the parties for them to make address. That was an error on part of the arbitrator. I therefore allow both 2nd and 3rd grounds.

In ***Kluane's case*** (supra) the Court of Appeal quashed the judgment of the High Court and set aside the orders arising therefrom and remitted the record to the High Court so that the matter can be assigned to another judge if necessary, to consider the issues raised *suo moto* and afford the parties right to be heard. In the application at hand, I find no need to take that route because the CMA record is clear that

the issue raised by the arbitrator was not supported by evidence. In other words, at first place, it was not an issue between the parties.

For all explained hereinabove, I hereby allow the application, quash and set aside the CMA award.

Dated at Dar es Salaam this 23rd March 2022.



B.E.K. Mganga
JUDGE