

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

REVISION APPLICATION NO. 25 OF 2022

(Arising from the Ruling dated 17th June 2022 issued by Hon. Muhanika, J, Arbitrator, in Labour dispute No CMA/DSM/KIN/880/2020/385/20)

RASHIDA AMOUR **APPLICANT**

VERSUS

MUSSA ISSA HASSAN **RESPONDENT**

JUDGMENT

Date of Last Order:17/10/2022
Date of Judgment: 25/10/2022

B. E. K. Mganga, J.

Facts of this application briefly are that respondent was employed by the applicant as driver. It happened that their relationship did not go well, as a result, respondent filed labour dispute No. CMA/DSM/KIN/880/2020/385/20 before the Commission for Mediation and Arbitration at Kinondoni complaining that he was unfairly terminated. It is said that on 16th December 2020, a certificate was issued to the effect that mediation has failed. It is alleged that after failure of mediation, applicant did not enter appearance, as a result, the dispute was heard exparte. Having heard evidence of the respondent, on 11th June 2021 Muhanika, J, arbitrator issued an exparte award in

favour of the respondent that termination was unfair. Arbitrator awarded respondent to be paid TZS. 5,723,000/= being one month salary in lieu of notice, one month salary as leave, severance pay, twelve (12) months' salary compensation, unpaid salaries for December 2019, January 2020, February 2020, and March 2020.

Aggrieved by the said ex parte award, on 18th June 2021, applicant filed an application to set aside the said ex parte award. In her affidavit in support of the application, applicant stated that after failure of mediation, she was neither served with summons to appear on the date of hearing nor date of the award until when she was served with a copy of the award on 15th June 2021 showing that an ex parte award was issued on 11th June 2021.

Respondent filed his counter affidavit opposing the application to set aside the ex parte award. In the said counter affidavit, respondent stated that applicant was dully served on 10th February 2021 and 9th March 2021 but she did not enter appearance.

Having heard submissions of the parties, on 17th December 2021, Hon. Muhanika, J, Arbitrator, delivered a ruling dismissing the application filed by the applicant on the ground that applicant was dully served but willfully opted not to enter appearance.

Further aggrieved, applicant filed this application seeking the court to revise the said ruling. In the affidavit in support of the Notice of Application, applicant raised six (6) issues namely:-

- 1. Whether the arbitrator was properly moved to proceed ex-parte without proof that applicant was served.*
- 2. Whether it was proper for the arbitrator to establish and rely on facts which were neither pleaded nor submitted by the respondent to reject the applicant application to set aside exparte hearing.*
- 3. Whether it was proper for arbitrator to decide the matter which was referred before the Commission out of time of the prescribed time under the law.*
- 4. Whether it was proper for the arbitrator to hold that the respondent was unfairly terminated while no proof whatsoever to prove the raised allegations.*
- 5. Whether it was proper for the arbitrator to award the amount which was neither pleaded nor proved and amount which was even greater than the amount claimed in CMA Form No.1.*
- 6. Whether it was proper for the arbitrator to decide the matter without establishing issues for determination.*

In opposing the application, the respondent filed both the Notice of Opposition and the counter affidavit.

At the time of arguing the application , Ms. Hawa Tursia, learned advocate for the applicant, abandon the 3rd issue and argued the 1st

issue separately but argued the 2nd and 5th together, and 4th and 6th together.

Submitting on the 1st issue, counsel for the applicant argued that applicant was not served. Counsel submitted that there are two summonses namely for 10th February 2021 and 09th March 2021. Counsel submitted further that, these Summons shows that they were received by the applicant, but they were not. She submitted the said summons were received by Chairperson of the hamlet. She maintained that applicant was not served and cited the case of ***Mavuno Project V. Albinus Vedasto Lyagala***, Revision No. 05/2021 to bolster her submission that in absence of proof of service, it cannot be proved that applicant was served hence proceedings were invalid.

In arguing the 2nd and 5th issues, counsel for the applicant submitted in CMA F1, respondent claimed TZS 4,603,846/= but he was awarded TZS 5,703,000/=. She cited the case of ***Bosco Stephen V. Ng'amba Secondary School***, Revision No. 38 of 2017, HC (unreported) and ***Abel Gama Makwasa V. E. Awadh & Co. Ltd***, Revision No. 506 of 2021, HC (unreported) to support her submissions that CMA F1 is pleadings.

Ms. Tursia learned counsel for the applicant argued further that respondent was supposed to prove his case though it was *exparte*. Counsel cited the case of ***Malikhita Y. Mputo V. Choice Investment Co. Ltd***, [2011-2012] LCCD 116 to that position and submitted that respondent did not prove his allegations.

In arguing the 4th and 6th issues, counsel for the applicant submitted that in the award, arbitrator found that applicant did not prove both fairness of reasons and procedure while the dispute was heard *exparte*. She went on that respondent was supposed, by evidence, to prove his case and that the arbitrator was required, under Rule 27(3) of GN. No. 67 of 2007 to show issues in dispute. Counsel therefore prayed the application be allowed.

On the other hand, respondent appeared in person and submitted generally that applicant was served by the hamlet Leader because she refused to receive summons from the respondent. In his submissions, respondent concede that in CMA F1 he claimed TZS 4,603,846/= and that he was awarded to be paid TZS 5,723,000/=. He submitted further that he proved his claims by evidence and that the award is proper in law. He therefore prayed that the application be dismissed.

In rejoinder, counsel for the applicant reiterated her submissions I chief.

I have examined the CMA record, documents filed by the parties in support and in opposing the application together with submissions made thereof and find that I should point out at this juncture the nature of the application before me and prayers thereof. This application was filed by the applicant by way of Notice in terms of Rule 24(1) of the Labour Court Rules, GN. No. 106 of 2007. Therefore, Applicant has moved the court by way of Notice of Application to grant the orders and reliefs she is seeking. I have examined both the Notice and Chamber summons and find that applicant has moved the court to revise the CMA decision dated 17th December 2021 that dismissed her application to set aside the exparte award. Both the Notice of Application and the Chamber Summons reads in part:-

...

TAKE NOTICE THAT, the Applicant intends to apply to the Court at a date and time fixed by the Deputy Registrar for an order that:-

- i. That this Honourable court may be pleased to revise and set aside the decision and its award of the Commission for Mediation and Arbitration Hon. J. MUHANIKA, **dated 17th December 2021.***
- ii. Any other relief(s) that this Honourable Court may deem fit and just to grant in the circumstance of this Application.*

TAKE NOTICE THAT the Applicant appoints Hawa Tursia..."

It is clear from both the Notice of Application and Chamber Summons as quoted hereinabove that applicant did not move the court to revise the ex parte award dated 11th June 2021 though, issues raised in the affidavit in support of the Notice of Application also covers the ex parte award. In my view, applicant was supposed to indicate both in the Notice of Application and the Chamber Summons that she was inviting the Court to revise both the ruling dismissing her application to set aside the ex parte award and the ex parte award itself for the court to determine issues relating to the ex parte award. Since the court was not moved to consider issues relating to the ex parte award, I will not deal with those issues in this judgment. I will only deal with what applicant prayed the court to deal with in the Notice of Application.

The only issue relating to dismissal of the application to set aside an ex parte award in other words, the only issues challenging the CMA ruling are (i) whether the arbitrator was properly moved to proceed ex parte without proof that applicant was served and (ii) whether it was proper for the arbitrator to establish and rely on facts which were neither pleaded nor submitted by the respondent to reject the applicant's application to set aside ex parte hearing.

It was submitted by counsel for the applicant that there is no proof that applicant was served with summons to appear on the date the matter was fixed for hearing and on the date it was fixed for issuing an exparte award. On the other hand, respondent submitted that applicant was dully served and she did not enter appearance. I have examined the CMA record and find that applicant was served with the Referral Form (CMA F1) on 18th November 2020 at 16:00hrs as it was duly signed and endorsed. In fact, in her affidavit she affirmed on 17th June 2021 before Francis Munuo, Commissioner for Oaths in support of the application to set aside exparte application she filed at CMA on bears testimony that applicant was aware of the mediation to its conclusion. In fact, the CMA record shows that during mediation, applicant was represented by Edwin Webiro, advocate and Aziz Mjemas, legal officer on 07th December 2020 and 16th December 2020 respectively.

CMA record shows that on 10th February 2021 the application was scheduled for orders but applicant did not enter appearance as a result it was adjourned to 22nd February 2021. The record shows further that applicant was served with the summons to appear on 22nd February 2021 but did not appear as a result it was adjourned to 9th March 2021. No summons was issued to the applicant to attend hearing on 22nd

February 2021. The matter was thereafter adjourned to 23rd March 2021. The record shows that on 10th March 2021 applicant was duly served with the summons appear on 23rd March 2022 but she did not. On the later date, arbitrator ordered the respondent to file opening statement and scheduled the matter for hearing on 4th May 2021. The record does not show whether applicant was served with summons to appear on 4th May 2021 for hearing or not. On 4th May 2021, issues were drafted and respondent proceeded to prove the matter exparte.

Having heard evidence of the respondent, arbitrator issued an order that the award will be issued within 30 days. I have examined the record and find that there is no proof that applicant was served with summons notifying her the date the award will be issued. I have noted further that, the award was issued on 11th June 2021 and that respondent received it on 14th June 2021. The record does not appearance of the parties on 11th June 2021. I therefore find that applicant was not notified the date of hearing of the application namely, on 4th May 2021 when the matter was heard exparte and the date the exparte award was issued on 11th June 2021.

For the foregoing, I find that the first complaint that applicant was not duly served has merit. I therefore allow the application, quash CMA

proceedings, and set aside the expert award and direct parties to go back to CMA so that the dispute can be heard interparty before another arbitrator. That ground has sufficiently disposed of the whole application hence I will not consider the 2nd issue raised by the applicant relating to dismissal of her application to set aside the exparte award.

Dated in Dar es Salaam on this 25th October 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 25th October 2022 in chambers in the presence of Emmanuel Ally, Advocate holding brief of Hawa Tursia, Advocate for the applicant and Mussa Issa Hassan, the respondent.



B. E. K. Mganga
JUDGE