

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

REVISION APPLICATION NO. 197 OF 2022

*(Arising from an award issued on 26/2/2021 by Hon. Lucia C. Chacha, arbitrator in labour dispute No.
CMA/DSM/ILA/R.872/17 at Ilala)*

CASH SALES STORES LIMITED APPLICANT

VERSUS

DAMAS NJOWI & ANOTHER RESPONDENTS

JUDGMENT

*Date of last Order: 11/10/2022
Date of Judgment: 28/10/2022*

B. E. K. Mganga, J.

Facts of this Revision application are that, on 17th August 2017, Damas M. Ngowi and Abdul Ibrahim Amiri, the 1st and 2nd respondents respectively, filed the complaint before the Commission for Mediation and Arbitration (CMA) complaining that applicant terminated their employment unfairly. In the Referral Form (CMA F1), respondents indicated that the dispute arose on 16th August 2017. Both the applicant and the respondents filed their opening statements and lists of documents to be relied upon. The last date of appearance of the applicant at CMA was on the date issues

were drafted thereafter failed to enter appearance. Due to non-appearance, the dispute was heard ex-parte.

On 9th September 2018, J.R. Katto, Arbitrator, issued an exparte award that termination of the respondents was unfair for want of reason and procedure. The arbitrator, therefore, awarded that TZS 5,294,423/= and TZS 5,206,923/= be paid to the 1st and 2nd respondents respectively. Applicant, being aggrieved with the said exparte award, filed Revision application No. 365 of 2019 before this court. On 8th May 2020, Hon. S.A.N. Wambura, J (as she then was) allowed the application filed by the applicant and set aside the exparte award. The Court (Hon. S.A.N. Wambura, J (as she then was) having allowed the application by the applicant, directed the parties to go back to CMA for the dispute to be heard *de novo* before a different arbitrator.

When the matter was returned to CMA, it was assigned to Lucia Chrisantus Chacha, Arbitrator. It happened that, initially, applicant entered appearance, but later, she stopped to appear. Again, due to no-appearance, the complaint was heard exparte and an exparte award was issued on 26th February 2021 in favour of the respondents. The Arbitrator

ordered applicant to pay TZS 4,181,000/= and TZS 5,152,000/= to the 1st and 2nd respondents respectively.

On 3rd March 2021, applicant filed an application to set aside an exparte award. But, on 21st April 2021, applicant prayed to withdraw her application, as a result, it was marked withdrawn. On 10th November 2021, applicant filed an application for extension of time to set aside the aforementioned exparte award. Having heard submissions of the parties, on 3rd June 2021, Hon. Lucia C. Chacha, arbitrator, dismissed applicant's application for extension of time within which to set aside exparte award on ground that applicant took eight (8) months' from the date she withdrew her application to set aside exparte award to file this application. Arbitrator found further that no reasons were assigned for such delay. Arbitrator also found that, the alleged illegality, namely, that applicant was not served to appear on the date of the exparte award is baseless, because applicant was present on the date the exparte award was issued and signed on the award to acknowledge to have received the said award on the same date.

Applicant was aggrieved by the said ruling dismissing her application for extension of time within which to file an application to set aside an

exparte award hence this application for revision beseeching the court to revise the said ruling. In the affidavit in support of the notice of application, applicant raised two issues namely:-

- i). Whether it was proper for the arbitrator to dismiss application to set aside exparte award.*
- ii). Whether the exparte award was legally correct.*

Respondents filed both the joint counter affidavit and the notice of opposition resisting the application.

When the application was called on for hearing, Daniel Kalasha, Principal Officer of the applicant appeared and argued for and on behalf of the applicant while respondents were represented by Hemed Omari, their personal representative.

In his submission in support of the application, Mr. Kalasha submitted that, the exparte award was issued on 26th February 2021 and was served to the applicant on the same date. He went that, on 10th November 2021, applicant filed an application at CMA for extension of time within which to set aside the exparte award. He submitted further that, applicant was supposed to file an application to set aside ex-parte award within fourteen (14) days, but applicant filed omnibus application (i) for extension of time and (ii) to set aside ex-parte award. He submitted that on 03rd June 2022,

the arbitrator delivered a ruling dismissing an application for extension of time together with an application to set aside ex-parte award hence this application.

It was submissions of Mr. Kalasha that in an application for extension of time, applicant advanced the ground of illegality. During submissions, Mr. Kalasha conceded that in the affidavit supporting an application for extension of time, applicant did not state that there is illegality in the impugned ex-parte award, but illegality as a ground was orally raised by applicant's legal officer during submissions.

As to reasons for the delay to file an application to set aside exparte award, Mr. Kalasha submitted that, applicant delayed to file an application to set aside ex-parte award because (i) there was a dispute of shareholding amongst the Directors of the applicant and (ii) on 27th January 2021, Mr. Kalasha, who is the legal officer of the applicant, was diagnosed with Covid 19, as a result, he was isolated. When probed by the court as whether; applicant was prevented to hire another advocate, he readily conceded that applicant was not barred to hire another Lawyer to file an application on her behalf. He went on to submit that, he resumed office duties on 03rd February 2021. In his submissions, legal officer of the

applicant conceded that applicant did not account for each day of the delay. Notwithstanding the afore acknowledge, Mr. Kalasha maintained that the application has merit and prayed that the CMA ruling be revised and set aside.

Responding to submissions made on behalf of the applicant, Mr. Omari, the personal representative of the respondents submitted that, in an application for extension of time, applicant did not advance good cause for the delay. He submitted further that, in the affidavit in support of the application, it was alleged that Daniel Kalasha was tested Covid 19 positive, but no medical proof was attached to the affidavit. He went on that; applicant filed an application for extension of time within which to file an application to set aside exparte award and an application to set aside exparte award eight months thereafter. Mr. Omari submitted that the said application was omnibus hence contrary to the law. He cited the case of ***The Registered Trustees of Kanisa la Pentekoste Mbeya V. Lamson Sikazwe & 4 Others***, Civil Appeal No. 210 of 2020, CAT (unreported) to support his submission that an omnibus application is contrary to the law and abuse of Court process. The personal representative of the

respondents concluded his submissions by praying that the application be dismissed for want of merit.

In rejoinder, Mr. Kalasha submitted that no preliminary objection was raised by the respondents at CMA relating to filing of omnibus application. He maintained that the application was properly filed.

I have examined the CMA record and considered submissions of the parties and find that there are no better words I can use other than saying that applicant has been filing applications including this one in abuse of court process with a view of blocking the respondents to enforce the award after she has unfairly terminated them from employment on 16th August 2017. From the date of termination to date, parties are in court corridors. My afore position is supported by what I have found in the CMA record as explained hereunder.

The CMA record shows that respondents filed the complaint at CMA on 17th August 2017 complaining that they were unfairly terminated. Both parties filed their opening statements and list of documents to be relied upon and issues were drafted in their presence as I have pointed out hereinabove. After drafting the issues, applicant stopped to enter appearance, as a result, the dispute was heard ex-parte. Having

considered evidence of the respondents, on 9th September 2018, J.R. Katto, Arbitrator issued an exparte award that termination of Damas M. Ngowi, the 1st respondent and Abdul Ibrahim Amiri, the 2nd respondent was unfair for want of reason and procedure. The arbitrator awarded TZS 5,294,423/= and TZS 5,206,923/= to the 1st and 2nd respondents respectively. The CMA record shows that after being notified of the said exparte award, applicant filed revision application No. 365 of 2019 before this court. On 8th May 2020, Hon. S.A.N. Wambura, J (as she then was) allowed the application filed by the applicant and set aside the exparte award and directed the parties to go back to CMA for the dispute to be heard de novo before a different arbitrator.

As pointed hereinabove, when the matter was returned to CMA, it was assigned to Lucia Chrisantus Chacha, Arbitrator. CMA record shows that on 23rd July 2020 Praygod Uisso, advocate appeared for and on behalf of the applicant and that Daniel Kalasha, Advocate appeared on 4th August 2020, 23rd September 2020 and on 27th November 2020. The record shows further that in all these dates, the matter was being adjourned on the instancy of the applicant and that on 27th November 2020 the matter was adjourned to 28th January 2021 as last adjournment. Again, on the later

date, applicant failed to enter appearance, as a result, the matter was heard ex parte. Having considered evidence of the respondents, on 26th February 2021 arbitrator issued an award in favour of the respondents. Arbitrator ordered applicant to pay TZS 4,181,000/= and TZS 5,152,000/= to the 1st and 2nd respondents respectively.

CMA record shows further that, on 3rd March 2021, applicant filed an application to set aside the said ex parte award. In the affidavit of Mr. Daniel Kalasha that was attested by Emmanuel Marwa, Advocate and Commissioner for oaths on 2nd March 2021 in support of the application, he deponed that on 12th February 2020, parties appeared before the arbitrator, but the matter was adjourned to 26th February 2021 for hearing. He deponed further that, on 26th February 2021 he was appearing before the High Court, Commercial Division in the case of ***Hanna International Restaurant vs. Iddi Pawa***, Misc. Application No. 384 of 2020. That, on 25th February 2021, he wrote a letter to arbitrator as a notice of absence and on 27th February 2021 he made follow up and was informed that an ex parte award was issued on 26th February 2021. On 21st April 2021, the date the application was scheduled for hearing, applicant prayed to withdraw the application on ground that she filed the application

unknowingly that the arbitrator has rectified an error on the award. Following that prayer, the arbitrator issued a ruling stating *inter alia*:-

“ Baada ya maelezo hayo TUME ilibaini yafuatayo:-

1. *Kweli mleta maombi alichukua nakala ya maamuzi/award **mnamo tarehe 26/2/2021 na nakala ya marekebisho mleta maombi aliweza kuipata mnamo tarehe 16/3/2021** kama alivyosaini katika nakala ya marekebisho ya uamuzi/award ambayo ipo mbele ya TUME.”*

Then the arbitrator marked the application as withdrawn.

From 21st April 2021, the date applicant's prayer to withdraw an application to set aside an exparte award was granted and the application withdrawn, applicant took no action to refile another application. The CMA record shows that it on 10 November 2021, applicant filed an application for extension of time within which to set aside the aforementioned exparte award. In his affidavit attested on 10th November 2021 by Emmanuel Marwa Advocate and commissioner for Oaths, Daniel Kalasha, deponed in paragraph 7 that on 12th February 2020 parties appeared before the arbitrator for hearing but the complaint was adjourned to 28th January 2021. In paragraph 8 and 9 he deponed that on 27th January 2021 the authorized legal representative of the applicant attended at Amana hospital for Corona Virus test and was tested positive and that he was ordered to

isolate. That on 28th January 2021 when the complaint was called on for hearing, applicant's legal representative could not enter appearance because he was under isolation. I should take a breath here and say few words before narrating what Daniel Kalasha further deponed in his affidavit in support of the application for extension of time that was dismissed by the arbitrator in her ruling which is the subject of this application. In his affidavit dated 2nd March 2021 in the application to set aside an exparte award, the application that applicant prayed to be withdrawn and was marked as withdrawn on 21st April 2021, Daniel Kalasha, said nothing relating to testing positive with COVID 19 and isolation as was allegedly directed by the doctors at Amana hospital. But in the later affidavit he deponed that he tested covid 19 positive on 27th January 2021. The alleged positive COVID 19 test was a new issue all together but without support of medical report. In my view, Daniel Kalasha told lies in his affidavit. In my view, that was a sufficient ground for dismissing the application because affidavits containing lies cannot be acted upon as it was held by the Court of Appeal in the case of [Jaliya Felix Rutaihwa vs Kalokora Bweshwa & Another](#), Civil Application No. 392 of 2020) [2021] TZCA 62. In [Jaliya's case](#) (supra) the Court of Appeal held:-

*"It is elementary that an affidavit that contains material falsehood cannot be acted upon: see, for instance, **Ignazio Messina v. Willow Investments SPRL**, Civil Application No. 21 of 2001; and **Kidodi Sugar Estates & 5 Others v. Tanga Petroleum Company Ltd.**, Civil Application No. 110 of 2009 (both unreported)"*

The Court of Appeal went on to quote what it held in **Ignazio Messina** (supra) that:

"An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue."

In not acting on an affidavit it found containing falsity, the Court of Appeal concluded: -

"In the premises, I find it unsafe to act on the supporting affidavit that patently contains substantial untruths tending to muddy the waters but work in favour of the applicant."

Again, in his affidavit in support of the application for extension of time within which to file an application to set aside exparte award, Daniel Kalasha did not disclose the name of the authorized legal representative who tested COVID 19 positive and that due to that positive test, he/she failed to enter appearance on 28th January 2021 when the application to set aside exported award was scheduled for hearing. The least I can say is

that; if there is a person to be relied upon to lie, is Daniela Kalasha. That is all. He told lies forgetting what he deponed earlier in another application but in proceedings between the same parties. Since applicant's affidavit in support of the application that was filed at CMA contained falsity and it is the same affidavit the applicant is inviting the court to use to fault the findings of the arbitrator, I am at home and dry that the arbitrator's finding that applicant did not adduce sufficient cause for the application to be granted cannot be faulted.

Having so said held, let me revert to other paragraphs deponed to, by Daniel Kalasha in support of the application for extension of time that was dismissed by the arbitrator hence this application. In paragraphs 10 and 11 he deponed that applicant made follow up and was informed by the arbitrator that the complaint was heard exparte on 28th January 2021 and that, the exparte award was issued on 26th February 2021. He deponed further that, applicant collected the exparte award on 26th February 2021 and filed an application to set aside exparte award and served the respondent on the same day. In these paragraphs, the deponent did not disclose the date of making follow up and the date isolation ended. Again, he told lies that applicant filed an application to set aside exparte award on

26th February 2021. The CMA record shows that applicant filed an application to set aside exparte award on 3rd March 2021 and not on 26th February 2021 and that on 21st April 2021, following her prayer, the application was marked withdrawn.

In paragraph 12 and 13 he deponed that on 16th March 2021 applicant collected the corrected exparte award and that on 21st April 2021 she withdrew an application to set aside exparte award. In paragraphs 14, 15, 16 and 17 he deponed that applicant could not file an application to set aside the corrected exparte award because there were serious points of illegality which needs to be adjudicated and that the exparte award be set aside due to illegality on the face of the record; no injustice will be cause to the respondent and concluded that the affidavit is in support of the reliefs sought in the notice of application.

The affidavit of Daniel Kalasha that was filed at CMA in support of the application for extension of time within which to file an application to set aside an exparte award as narrated hereinabove, does not give reasons as to why applicant failed to file an application earlier and waited until on 10th November 2021 that is almost 8 months' after her prayer to withdraw the earlier application to set aside exparte award was granted on 21st April

2021. Not only that but also, there is no account for each day of the delay. It is a settled principal of law that, in an application for extension of time, applicant must account for each day of the delay. There is a litany of cases to that position. See the case of **Sebastian Ndaula vs. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014 CAT (unreported), [Elias Kahimba Tibendalana vs. Inspector General of Police & Attorney General](#), Civil Application No. 388/01 of 2020 CAT (unreported), [Said Nassor Zahor and Others vs. Nassor Zahor Abdallah El Nabahany and Another](#), Civil Application No. 278/15 of 2016, CAT, (unreported), [Finca T. Limited & Another vs Boniface Mwalukisa](#), Civil Application No. 589 of 2018) [2019] TZCA 56, and Bushiri **Hassan vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, CAT (unreported). In **Mashayo's case** (supra), the Court of Appeal held inter-alia that: -

"...the delay of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken."

In the affidavit in support of the application, applicant did not account for each day of the delay. Applicant was served with the exparte award on the date it was delivered but was served with the corrected

exparte award on 16th March 2021 and on 21st April 2021 she withdrew the application to set aside exparte Award she filed earlier before being served with the corrected exported award. As pointed hereinabove, applicant did not account for each day of the delay from 21st April 2021 to 10th November 2021 when she filed an application for extension of time within which to file an application to set aside the exparte award.

In her ruling dismissing the application by the applicant, the arbitrator found that there was no reason assigned by the applicant for the delay of 8 months' from the date applicant withdrew her application to set aside exparte award. The Arbitrator further found that, the alleged illegality that applicant was not served to appear on the date of the exparte award is baseless because applicant was present on the date the exparte award was issued and signed on the award to acknowledge to have received the said award on the same date. I agree with the arbitrator's findings because Kalasha's affidavit in support of the application for extension of time to set aside the exparte award supports that finding. As it was conceded by Mr. Kalasha in his submissions, in the affidavit in support of the application, applicant did not raise illegality as a ground for

extension of time but raised it from the bar during submissions. That was not proper, and the arbitrator was entitled to dismiss it.

The two reasons advanced by the principal officer of the applicant namely, misunderstanding or dispute amongst the directors of the applicant and unsupported claim of COVID 19 test of the applicant's legal officer, flimsy as they are, cannot warrant this court to revise the impugned CMA ruling. It is my view that, if there was misunderstandings or conflicts among directors of the applicant, that is their own business, of which, neither the court nor the respondents, are concerned. It was their duty to keep their house clean remembering that their internal conflict cannot stop the operation of the law, and that, by their conflict, they were exposing themselves to several dangers including but not limited to dismissal of this application. The least I can say is that; I am not convinced by the grounds advanced by the applicant in the application to set aside the exparte award and grounds of revision in this application. It seems to me that applicant has been filing applications before both CMA and this court, which if done in good faith, it is her right. But occurrence of events in this application shows that applicant is praying foul games through legal technicalities with a view to ensure that respondents be paid or cannot execute the award.

That should stop forthwith because keys to that room got lost and are not yet to be recovered and certainly, there is no possibility to be recovered.

For all explained hereinabove, I find that the application is unmerited and dismiss it.

Dated at Dar es Salaam this 28th October 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 28th October 2022 in chambers in the presence of Caesar Kabissa, Advocate for the applicant and Hemed Omari, Personal Representative of the respondents.



B. E. K. Mganga
JUDGE