

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION APPLICATION NO. 252 OF 2022**

TONGDA VENTURE LIMITED.....APPLICANT

VERSUS

ASMART AHMAD MNYAMATU.....RESPONDENT

JUDGMENT

*Date of last Order: 26/10/2022
Date of Judgment: 27/10/2022*

B. E. K. Mganga, J

Applicant was the employee of the respondent. It happened that employment relationship of the two did not go well as a result, respondent filed labour dispute No. CMA/PWN/KIS/1/2021 before CMA at Kisarawe complaining that his employment was unfairly terminated by the applicant. The dispute that was filed by the applicant was heard ex parte and an ex parte award was issued in his favour. In the said ex parte award, applicant was ordered to pay TZS 10,160,000/= to the respondent.

Applicant was aggrieved with the said ex parte award, as a result, she filed an application to set aside the said ex parte award, her application was dismissed for want of merit. Further aggrieved by the ruling dismissing her

application to set aside *ex parte* award, applicant filed this application seeking the court to revise the said ruling.

In the affidavit in support her application, applicant raised five grounds but during hearing she abandoned three grounds and argued only two grounds as hereunder:-

- 1) Arbitrator erred to hold that applicant had no sufficient ground for non appearance that led the dispute to be heard ex parte.*
- 2) That the arbitrator erred in law to rely on a defective counter affidavit filed by the respondent which did not object the application.*

The application was resisted by the respondent who filed both the notice of Opposition and the counter affidavit.

Mr. Abraham John Mkenda, learned Advocate appeared before me and argued the application for and on behalf of the applicant while Mr. Kelvin Mundo, Personal representative, appeared and argued for and on behalf of the respondent.

Submitting on the 1st ground, Mr. Mkenda argued that, applicant did not attend at CMA because she agreed with one Frank Makashi, who introduced himself as an advocate to be her representative at CMA. Counsel submitted that, after the said Frank Makashi has agreed with one Ji Zheng, the principal officer of the applicant, the latter travelled to China but when he came back

he noted that Mr. Frank Makashi is not an advocate. Counsel submitted further that Mr. Ji Zheng noted that Frank Makashi did not enter appearance at CMA. Learned counsel for the applicant went on to submit that, at CMA, Mr. Ji Zheng tendered his air ticket and medical report to prove that he was outside the country, which is why, he failed to make follow up the dispute that was filed against the applicant by the respondent.

Mr. Mkenda submitted further that, the said Ji Zheng went to the Tanganyika Law Society and met some officers who informed him that the said Frank Makashi was not an advocate. When probed by the court as to whether; there is proof that the said Ji Zheng was informed by officers at the Tanganyika Law Society that Frank Makashi is not an advocate, he readily conceded that applicant did not attach an affidavit of officers of the Tanganyika Law Society, who informed him that Frank Makashi is not an advocate and that there is not such proof that he was so informed. Counsel for the applicant conceded further that in the affidavit filed at CMA, applicant did not disclose the names of the officers at the Tanganyika Law Society who informed him that Frank Makashi is not an advocate. He also conceded that applicant is a limited Company registered in Tanzania and that it has other directors and principal officers apart from Ji Zheng who travelled to China.

Counsel for the applicant submitted that other directors of the applicant were in Lindi Tanzania. When asked by the court as to whether; applicant adduced sufficient reasons as to why other directors who were in Lindi did not following up the matter at CMA, learned counsel conceded that no reason was disclosed.

On the 2nd ground, Mr. Mkenda, submitted that the counter affidavit that was filed by the respondent at CMA contained general denials but the arbitrator relied on that counter affidavit to dismiss the application. He however conceded that applicant did not raise objection on defectiveness of the said counter affidavit hence it was not an issue that was discussed at CMA. Counsel for the applicant concluded his submissions praying that the application be allowed.

Resisting the application, Mr. Mundo, the personal representative of the respondent, argued the two grounds jointly by submitting that CMA record shows that applicant was served with summons and prayed time to engage an advocate but thereafter she did not enter appearance. Mr. Mundo submitted further that, there is no proof that applicant engaged Frank Makashi to represent her in the dispute that was filed by the respondent at CMA. He went on that, there is no proof also that applicant was informed by Tanganyika Law

Society officers that Frank Makashi is not advocate. Mr. Mundo submitted that applicant was negligent and did not take action to handle the matter. Mundo cited the case of ***Lim Han Yung and another v. Lucy Treseas Kristensen***, Civil Application No.219 of 2019, Court of Appeal of Tanzania(unreported) to bolster his submissions that applicant was supposed to adduct sufficient cause that led to her non appearance and further that, applicant cannot throw blames to the advocate. Mr. Mundo concluded his submissions by praying that the application be dismissed for want of merit.

In rejoinder, Mr. Mkenda, submitted that other directors of the applicant did not attend as they knew that the advocate who agreed with Ji Zheng will enter appearance.

I have considered submissions made on behalf of the parties, and for convenience, I will first dispose the 2nd ground in which it was submitted that arbitrator erred to rely on a defective counter affidavit that was full of denial, and which, did not object the application by the applicant. It was rightly conceded by counsel for the applicant that no objection relating to defectiveness of the said counter affidavit was raised during hearing at CMA hence it was not an issue that was argued. It is my view that since it was not

raised and determined at CMA, it cannot be raised at this stage. That said, I hereby dismiss the 2nd ground.

It was submitted by counsel for the applicant that applicant adduced sufficient evidence that Ji Zheng, the principal officer of the applicant travelled to China after he had agreed with Frank Makashi who, Mr. Ji Zheng believed was an advocate, but later on it came out that he was not. Reliance was made on airticket and medical report of Mr. Ji Zheng. I have read an affidavit of Ji Zheng that was attested by Sarah John Mkenda, advocate and Commissioner for Oaths on 21st February 2022 and filed at CMA on the same date and find that it was drafted by Abraham John Mkenda, advocate. I will not, in this application, discuss whether; it was proper or not, but I will only discuss reasons advanced therein. In the said affidavit, Ji Zheng, deponed at paragraph 2 that applicant is a company duly registered and operates her business in accordance with the laws of the United Republic of Tanzania. In paragraph 4 and 5, he deponed that applicant was duly served with summons to appear before the Commission and that she appeared and prayed to be given ample time to look for an advocate. That, their prayer was granted and further that applicant agreed with Frank Makashi who introduced

himself as advocate. In paragraph 13, Ji Zheng deposed that, non-appearance was neither due to negligence nor inaction of the applicant.

It is my view from the foregoing that, there is no dispute that applicant was served and by her choice of an advocate or a person to represent her at CMA, she failed to enter appearance, as result, the matter was heard ex parte. It is my view that, applicant was negligent and inaction because, there is no reasons assigned as to why other directors failed to make follow up of the matter at the time Ji Zheng was in China. I am of the view that applicant dumped the matter at CMA and cannot be heard now complaining for her failure to take action to protect her interest. In fact, the court of Appeal was confronted with almost a similar situation in the case of [Lim Han Yung & Another vs Lucy Treseas Kristensen](#), Civil Appeal No. 219 of 2019) [2022] TZCA 400 and held as follows:-

"...generally, the remedy for setting aside an ex parte judgment is available if the judgment debtor shows good cause to justify his failure to either appear on the date the suit is called on for hearing or file a written statement of defence..."

It is also our considered view that even if the appellants were truthful in their allegations against their erstwhile advocates' inaction, negligence or omission, which generally, does not amount to good cause, they themselves share the blame. The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate, has a duty to

closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an ex parte judgment passed against him."

For the foregoing, I find that the 1st ground of revision also lacks merit and dismiss it. In the upshot, I find that the arbitrator correctly dismissed the application by the applicant and that there is no reason to fault that findings. I therefore dismiss this application for want of merit.

Dated in Dar es Salaam on this 27th October 2022



B. E. K. Mganga
JUDGE

Judgment delivered on this 27th October 2022 in chambers in the presence of Abraham John Mkenda, Advocate for the applicant and Kelvin Mundo, Personal Representative of the respondent.



B. E. K. Mganga
JUDGE