

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 307 OF 2022

*(From the Ruling of the Commission for Mediation and Arbitration of Dar es salaam at
Ilala dated 02nd day of September 2022 in Labour Dispute No.
CMA/DSM/ILA/191/22//121/2022
(By Chacha: Arbitrator)*

DURBAN HOTEL LTD & CONCORD HOTEL LTD.....APPLICANT

VERSUS

JOACHIM JOLIGA.....RESPONDENT

RULING

K. T. R. MTEULE, J.

08th February 2023 & 13th February 2023

This Ruling concerns preliminary objection raised by the Respondent to challenge the tenability of this application on points of law. The application is seeking for this court to call for the record and revise the proceedings in Labour Dispute No. CMA/DSM/191/22/121/2022 from the Commission for Mediation and Arbitration of Dar es salaam, Ilala (CMA). The application further seeks for this court to quash the orders and Ex parte award arising from the said labour dispute.

The Respondent's preliminary objection is to the effect that, the revision application is premature for seeking revision in this Court



instead of applying for orders to set aside the impugned Ex parte award.

The preliminary objection was heard by oral submissions. The Respondent appeared in person while the applicant was represented by Mr. Vicent Laurent Kisanga, Advocate.

Arguing to support the preliminary objection, the Respondent submitted that the application is prematurely filed because the applicant had to exhaust all the remedies in the CMA by seeking to set aside the Ex parte award. According to him, this is in accordance with **Section 87 (5) (a) and (b) of the Employment and Labour Relations Act Cap 366 R.E 2019**. He added that the applicants would prefer revision only after being dissatisfied by the CMA refusal to set aside the ex parte award. The Respondent further referred to the decision of this Court in the case of **M/S Jaffer Academy vs. HHawu Migire, Revision No. 71 of 2010, High Court of Tanzania, Labour Division, at Dar es Salaam, (unreported) at page 2 para 1 &2** where the Court in the similar circumstances held the matter to be premature. He thus prayed for the application to be dismissed.

In reply Mr. Kisanga submitted that the **Labour Court Rules of 2007, Rule 28 (1) (c) (d)**, allows revision of a decision of any

body. He added that there is material irregularity and errors in the challenged award, that's why they did not go to ask for setting aside of the matter. Bolstering his position, he cited the case of **Barklays Bank Tanzania Limited vs. Ayyam Matessa, Civil Appeal No. 481 of 2020**, Court of Appeal of Tanzania, issued on 12th April 2022. He stated that in this case, the matter was decided ex parte by CMA, revision was sought in the High Court where it was denied, after the matter being referred to the Court of Appeal by a way of Appeal, the Court of Appeal set aside the decision of the CMA. For that reason, he is of the view that there is a possibility of allowing an appeal against an ex parte decision.

In rejoinder the respondent reiterated his submission in chief, but insisted that the Rule cited by the respondent is a creature of the statute, therefore the applicant ought to follow the provision of **Cap 366 of 2019 R.E.**

Having gone through the parties' submissions I feel called upon to determine **whether the preliminary objection raised is meritorious.**

According to **Section 87(5)(b) of the Employment and Labour Relations Act, [Cap. 366 R.E 2019]** under which the preliminary objection is based, the Commission may reverse its decision after

being satisfied that there are good grounds for failing to attend the hearing. Although I agree with the applicant that it is not absolute that an ex parte decision cannot strictly be appealed or sought to be revised by an aggrieved party, the circumstance to so allow needs to be considered diligently. There are circumstances like in **(Ayyam Matessa's)** case cited supra by the applicant, where the ex parte award was wrongly issued by a mediator who did not have power to do so in this kind of situation revision can be exercised. The only way to correct the matter in **Matessa's case** was by a way of revision or appeal since the mediator who issued the ex parte award could not be empowered to even determine an application to set it aside since the court found that the power of a mediator is only confined to mediation. With due respect to the Applicant's counsel, the instant situation cannot be compared to **Ayyam Matessa's** case seeking revision or appeal against an ex parte order should not be encouraged especially when there is a possibility of getting a remedy in the forum of the first instance.

In this application one of the grounds deponed by the applicant as per paragraph 14 (i) (c) of the affidavit is that the arbitrator erred in law in issuing ex-parte award while the summons was not properly served. To resolve the question as to whether the summons was



properly procured in my view rests within the powers of the CMA which issued the ex parte award in considering an application to set aside the said award.

I am therefore of the view that the best remedy for the applicant was to file application of setting aside the ex parte award before the Commission by adducing the alleged reason for the failure to attend hearing. After the restoration of the matter then the arbitrator will be in a position to consider the legal issues if moved, and the entire application on merit.

In is on the above reasons I have declined to agree with the applicant's assertion regarding irregularity and application of **Rule 28 of the Labour Court Rules**. I concur with the applicant on the position in **M/S Jaffer Academy vs. HHawu Migire, Revision No. 71 of 2010, High Court of Tanzania, Labour Division, at Dar es Salaam, (unreported) at page 2 para 1 &2**. In that case, the court was on position that it is an established principle that one must first exhaust the internal remedies before challenging a matter in a higher forum.

From the above legal reasoning I agree with the respondent that the matter was filed prematurely, as it was filed in this Court without exhausting a remedy of application to set aside the Ex-parte award in

the Commission. I have no hesitation to say that the issue as to **whether the preliminary objection is meritorious** is answered affirmatively.

Therefore, I hereby uphold Preliminary Objection and strike out this application for having been filed prematurely. Each party to bear its own cost. It is so ordered.

Dated at Dar es Salaam this 13th Day of February, 2023.




KATARINA REVOCATI MTEULE

JUDGE

13/02/2023