IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 328 OF 2022

(Arising for the Commission for Mediation and Arbitration of Morogoro in Labour Dispute No. CMA/DSM/ILA/22/222/22 (Hon Lucia Crisantus Chacha, Mediator)

DANIEL NAHUMI NGILANGWA ....APPLICANT

VERSUS

KAMAKA ....RESPONDENT

JUDGMENT

K.T.R, Mteule, J

3rd March, 2023 & 8th March, 2023

This is an Application for Revision where the Applicant vide CMA Form No. 1 claimed to have been unfairly terminated from employment by the Respondent, demanding to be paid terminal benefits and compensation for unfair termination. According to the CMA Form No. 1, the Respondent is KAMAKA.

While the matter was at the arbitration stage, the arbitrator noted that **Pugu Nail Company Limited** should have been the employer of the applicant. The Arbitrator noted further that the name of the Respondent KAMAKA was wrongly spelt in the CMA Form No 1 because throughout, the Respondent has been identifying himself as KAMANA and not KAMAKA. She formed a view that the anomalies will hinder the

execution process. Consequently, the arbitrator withdrew the matter with an order to the Applicant to add Pugu Nail Company Limited so that evidence could lead reveal who is the actual employer of the Applicant should the applicant prefer to lodge it afresh.

Being aggrieved by the order of withdrawal of his Labour Dispute, the Applicant preferred this application which is accompanied by his affidavit containing 3 grounds of revision which are: -

1. Whether it was proper for the arbitrator to find that the Applicant had a duty to sue a third party and dismiss the claim
2. Whether it was proper for the arbitrator to dismiss the complaint due to incorrect Respondent's name without considering the oral application of the applicant to correct the name
3. Whether the arbitrator properly and correctly analysed evidence.

The Respondent filed a counter affidavit to contest the Applicant's claims. The counter affidavit disputed all the assertions of the Applicant's affidavit.

The Application was argued by written submissions. The Applicant's submissions were drawn and filed by Advocate Emmanuel William Ndaga from FUENA ATTORNEYS, while the Respondent's submissions were drawn and filed by Bakari Juma from Future Mark Attorneys.

In his submissions Mr. Ndaga faulted the arbitrator's order to add **Pugu Nail Company Limited** while the applicant did not have any dispute with that Company. He is of the view that if the arbitrator found interest of justice for another person to be added, it was the duty of the respondent who alleged that there is a third party to add him as a third party and not to force the applicant to sue a person with whom he does not have any contract or any legal action.

Mr. Ndaga complained about denial of right to be heard to the applicant since after hearing of the Respondent, the arbitrator made a decision which was not in favour of the applicant without giving him any chance to be heard. According to him, the arbitrator did not evaluate the evidence given.

In reply, Advocate Juma Bakari for the Respondent drew that attention of the Court to the provision of **Section 91 (1) of the Employment and Labour Relations Act No. 6 of 2004 (Cap 366 of 2019 R.E)** which according to his interpretation, states that an application for revision is solely preferred when there is an arbitral award. He challenged the Applicant's revision application for having been filed against an order and not an arbitral award as prescribed by the law.

Further to that, the respondent submitted that, no revision can be filed before the higher court on interlocutory order made by subordinate court. According to him, the order of the CMA dated 29th July 2022 was interlocutory because it did not have effect of finalizing the applicant's case at the CMA and thus, it is not proper for the applicant to prefer this kind of application. According to him, the application is contrary to **section 79 (2) of the Civil Procedure Code Cap 33 RE 20219**. The Applicant therefore urged this court to take into consideration that the application has been preferred pre maturely before this court and that, since the above raised question relates on jurisdiction of this court, it is proper to raise it even at this time.

Without prejudice to the aforesaid Advocate Juma submitted on the alternative by starting to address the first ground of revision. According to him, the Applicant's counsel misconceived the order of the Arbitrator who merely did not evaluate or rule on the relationship status between the Applicant and the Respondent but rather ordered at page 2 of the order that there was a need to include **Pugu Nails Company Limited** as a necessary party who was mentioned during hearing of the Respondent's case so as to easily establish who was the real employer of the Applicant to avoid prolonged litigations and ensure that not only justice is done but it is seen to have been done. Being aware of the

provision of **Order I Rule 14 (a) and (b) of the Civil Procedure Code CAP 33 RE 2019** which requires a defendant who has a claim against any other party not party to the suit to file for a leave to join a third party, Mr. Bakari submitted that in our case the Respondent has no any claim of contribution or indemnity against **Pugu Nails Company Limited**, therefore, he is not required in any way to seek leave to file third party notice so as to join **Pugu Nails Company Limited** as a third party.

According to him, the Respondent simply contested to have any employment relationship with the Complainant and simply made it aware to the Commission that, the complainant used to work as a casual worker in a project at Kisemvule, Mkuranga which was under operation and management of her sister company **Pugu Nails Company Limited**.

He commended the Hon. Arbitrator for having not wasted time and for having taken note of interest of justice to struck out the complaint so that the complainant could properly file a fresh complaint adding **Pugu Nails Company Limited** as a necessary party so as to establish who is the real employer of the complainant.

Mr. Bakari supported his contention with **Order I Rule 10 (2)** which provides that, "the court may at any stage of the proceeding order any name of the person to be added whose presence is necessary for the court to effectually and completely to adjudicate upon and settle all questions involved in a suit". He referred to the case of **MEXONS INVESTMENT LIMITED VS. CRDB BANK PIC, Court of Appeal of Tanzania at Dares Salaam, Civil Appeal No. 222 of 2018 (Unreported)** where the Court of Appeal quoted **Order I Rule 10 (2) of the Civil Procedure Code CAP 33** at pages 8, 9 and 10 of the decision and held that Mogas as a necessary party ought to have been added in the suit before the High Court.

It is Advocate Bakari's submission that, there is no error in the order of the Commission for the Complainant to add **Pugu Nails Company Limited** as a necessary party to the complaint.

Replying to the second ground, Advocate Bakari submitted that the Hon. Arbitrator did not error in ordering the complainant to file a fresh complaint containing the proper name of the Respondent for proper records and easy justification of the rightful party in the future when the claim will be heard on merit. According to him, wrong naming of parties is crucial in any Application making it incompetent in law and facts. He

referred to the case of **IBRAHIM MALIK MBENA VS. DARES SALAAM PARKLAND INVESTMENT CO. LTD AND SALHA YAHAYA RUBAMA H.C Land Division at Dares Salaam**, among other things the court at page 6 and 7 of the ruling held that:-

> *"it is the law that the names appearing in the pleadings must be used throughout the proceedings.*
>
> *...........This assists easy reference of the case or identification of the parties especially at times of execution".*

He submitted that in the above cited case, the Application was struck out to enable the Applicant to identify and sue a proper party. He stated that, in the light of the above position the Hon. Arbitrator was right to strike out the complaint for containing incorrect name of the Respondent and since the Respondent herein is a Company, should have been recognized by its full name of incorporation.

Replying to the third ground of revision, Advocate Bakari submitted that the Hon. Arbitrator was very clear at page 2 of the order that, the Applicant should file a fresh complaint in accordance with the law.

Advocate Bakari denied contravention of **Article 13 of the Constitution of the United Republic of Tanzania** on right to be heard. He is of the opinion that, the Applicant was not deprived of this right since the matter before CMA was not heard on merit to its finality but the CMA discovered that there was a need for a fresh complaint to be filed containing correct names of the Respondent and adding a necessary party for the purpose of proper record and justification of the award to be rendered later on after the hearing of both parties on merit.

Further reference is made to **Order I Rule 10 (2) of the Civil procedure Code Cap 33,** which gives power to the court at any stage of the proceeding to order addition of a proper party where it deems fit.

Having considered the CMA proceedings and the impugned order, and the submission of the parties, I am inclined to consider **whether the applicant has established sufficient grounds for this court to revise and set aside the Order of the CMA.**

Basing on the above submission, I see it worth to begin with the points of law raised by the respondent in the submission. The first point of law revolves around the assertion that this application is pre-maturely brought before this court as the orders sought are against an Order of the Commission and not an award as provided by the law. The law said

to have been contravened is **Section 91 (1) of Cap 366** which in his view, confines revisions to an award and not orders. The section provides:-

> *"91.-(1) Any party to an arbitration award made under section 88(10)who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for a decision to set aside the arbitration award"*

Section 88 (10) and (11) provides for the final results of the arbitration proceedings. It states:-

> *"88 - (10) An arbitrator may make any appropriate award but may not make an order for costs unless a party or a person representing a party acted in a frivolous or vexatious manner.*
>
> *(11) Within thirty days of the conclusion of the arbitration proceedings, the arbitrator shall issue an award with reasons signed by the arbitrator."*

My interpretation to the above provisions is that the law expects that the outcome of an arbitration should be an award. If an arbitrator

concludes an arbitration hearing without an award, it is already an error on the face of it. Therefore, I am not convinced with the Respondent that there was no award in the arbitration because what the arbitrator ought to do was to make an award.

As to whether revision is merely confined to arbitration and not any other order, I would draw the attention of the parties to the provision of **Rule 28 (1) of the Labour Court Rules, G.N. No. 106 of 2007** which provides: -

"28 - (1) The Court may, on its own motion or on application by any party or interested person, call for the record of any proceedings which have been decided by any responsible person or body implementing the provisions of the Acts and in which no appeal lies or has been taken thereto, and if such responsible person or body appears-

(a) to have exercised jurisdiction not vested in it by law; or

(b) to have failed to exercise jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity; or

(d) that there has been an error material to the merits of the subject matter before such responsible person or body involving injustice,

(e) the Court may revise the proceedings and make such order as it deems fit:"

What I construe from the above quotation is that the cited **Rule 28 (1)** is where the Labour Division of the High Court derives its revisional powers. It is apparent from that provisions that the revisional powers go beyond a mere arbitral award. The powers include revising any decision "*with an error material to the merits of the subject matter before such responsible person or body involving injustice".* From this provision, the Respondent's argument that revisional power is confined to award alone holds no water.

Another point of law advanced by the applicant is that the order of the arbitrator is an interlocutory order because it did not finalise the matter on merit. I agree with the principle explained by the applicant in testing whether an order is interlocutory of not. The test is the effect of finality. The question to be asked is whether the impugned order finally determined the matter. I have considered parties arguments. The applicant's complaints in this revision is that he does not have claims against **Pugu Nail Company Limited** while the order struck out the matter with an order to compel the applicant to sue a person he does not want to sue. In my view, this put the matter to an eternal rest

because, the applicant cannot sue a person from whom he claims nothing. The applicant's hands are closed from reinstituting the matter against the instant respondent. In my view, the order sought to be revised is not an interlocutory order because it finalised the matter.

Regarding the grounds of revision, I now come to the first ground which raised an issue as to whether it was proper for the arbitrator to find that the applicant had a duty to sue a third party and dismiss the complaint. I agree with the Respondent's citation of **Order I Rule 10 (2)** of the **CPC** which provides that:-

> *"the court may at any stage of the proceeding order any name of the person to be added whose presence is necessary for the court to effectually and completely adjudicate upon and settle all questions involved in a suit"*

However, I do not agree with the argument that the arbitrator's order was consonant with **Order 1 Rule 10** supra. The provision allows addition of a party in the ongoing proceedings. I don't see any implication from that provision that the court should strike out the matter and order refiling where a necessary party is left out. In my view, if the arbitrator found it necessity to have the name of **Pugu Nail**

Company Limited to be added in the proceedings, the appropriate order was to have it added in the same proceedings and not to strike out the matter to the detriment of a party who did not need such a name in the proceedings. In my view, it was not proper for the arbitrator to strike out the labour dispute filed by the applicant.

Another issue was whether it was proper for the arbitrator to dismiss the complaint due to incorrect spelling of the respondent without a consideration to the applicant's oral application to amend the name. If there were errors in the names of the parties, and that the applicant made an oral prayer to amend it, I cannot see any reason why did the arbitrator denied the opportunity to have the pleadings amended and opted to strike out the matter. The amendment could also take care of adding the **Pugu Nail Company Limited** who was considered by the arbitrator to be a necessary party in the matter rather than the harsh choice of striking out the matter. It is my finding that the CMA erred in striking out the matter on mere reasons of having misspelled a party's name and lack of necessary party.

The last ground raised an issue as to whether the arbitrator properly analysed the evidence. The answer to this question is simple because there was no analysis of evidence in the award. Only one party testified

and basing on that evidence, the arbitrator decided to strike out the complaint. In this kind of a situation, the arbitrator did not properly evaluate the evidence.

The above said, I am of the view that the issue as to whether the applicant has established sufficient grounds for this court to revise and set aside the order of the CMA is answered affirmatively.

Consequently, I hereby revise the proceedings of the Commission for Mediation and Arbitration and set aside the order dated **29th July 2022**. I make further order that the matter should be reverted to the CMA, restored to arbitration and proceed with hearing from the stage it was prior to the order which struck it out. Shall the need to add a party still be relevant, such addition should be done within the same proceedings. The revision application is therefore allowed. No orders as to costs. It is so ordered.

Dated at Dar es Salaam this 8th day of March 2023.

KATARINA REVOCATI MTEULE

JUDGE

08/03/2023