IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 322 OF 2022

(From the decision of the Commission for Mediation and Arbitration at Kinondoni in Labour Dispute No. CMA/DSM/KIN/0792/21/19/397, Wilbard, G.M.: Arbitrator Dated 09th September, 2022)

LETSHENGO BANK (T) LTD.....APPLICANT

VERSUS

SALOME E. MWAKIGOMBA.....RESPONDENT

RULING

14th – 29th March, 2023

OPIYO, J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/0792/21/19/397. This court has been asked to revise the proceeding and vary the award of the CMA.

Historically, the respondent was employed by the applicant as a senior credit department manager on 11th July, 2017 until on 27th August, 2019 when she was terminated on the ground of dishonest and lack of integrity.

Aggrieved; the respondent filed for a labour dispute at CMA alleging unfair termination. The matter was heard and the award was in favour of the respondent. The applicant being dissatisfied filed for this application.

This application is supported by the applicant's affidavit sworn by Ladislaus Muhagachi, Applicants' principal officer stating grounds for revision. However, before the matter was heard on merit, the respondent raised a preliminary objection to the effect that the Application is incompetent for failure to file a mandatory notice of intention to seek revision by the Applicant contrary to Regulation 34(1) of the Employment and Labour Relations (General) Regulations GN. No. 47 of 2017.

The hearing proceeded orally. Both parties were represented by Learned Advocates. Mr. John Mfangavo for the applicant whereas Mr. Roman Masumbuko appeared for the respondent.

For that; I am obliged under the law to determine the preliminary objection first before going to the substantive matter (see the case of **Deonisia Onesmo Muyoga and 4 Others v Emmanuel Jumanne Luhahula, Civil Appeal no. 219 of 2020, CAT, Mugasha JA.)** In bringing his objection home, Mr. Masumbuko representing the respondent submitted that Regulation No. 34(1) of GN 34/2017 was not complied with as the applicant failed to file the required notice. He stated that the provision make it mandatory that initiation of revision requires filing of the relevant CMA form No. 10.

He continued to argue that the form has to be filed at CMA to indicate the intention of filing application for revision for whoever is aggrieved by the decision there. He contended, the said form is similar to notice of Appeal in the Court of Appeal and non-filing means there is no competent revision being preferred by the applicant.

In backing his point he referred to cases of **Anthony John Kazembe Vs. Inter Testing Services (EA) Ltd PTY Ltd, Revision No. 391 of 2021, Hon. Mganga, J.** at page 6, **Sarah Richard Hamza Vs. NMB PLC, Labour Revision No. 96/2020, Hon. Robert, J.** and **CRDB Bank PLC Vs. Sylvester Samson Mboje, Misc. Labour Application No. 505 of 2022, Hon. Mlyambina, J at page 13** in which the necessity of filing CMA form No. 10 for initiation of proceedings was emphasised. He then concluded by contending that, since there is no such form indicating that the applicant was aggrived by the CMA award and was therefore signifying her interntion to file revision, the application is incompetent and so prayed for it to be struck out.

Mr. Mfangavo, representing the applicant was quick to counter the above argument by submitting that CMA form No. 10 is created for management purposes only, thus its non filing is not fatal. He supported his point by referring to the case of **Tanzania Revenue Authority Vs. Mulamuzi Byabusha, Revision No. 312/2021, Hon. Rwizile, J. at page 6.** He then stated that the said form was specifically created for CMA and ought to be filed at CMA to inform it of the party's intention to seek revision at

the High Court Labour Division. It has nothing to do with the application before this court.

His further submission is that, the notion that the form was not filed in itself wants evidence to prove. In his view, the respondent had to prove that the form was filed or not, so it is not a pure point of law to be detrmined as a preliminary objection. He then referred to the case of **Alex Situmbura Vs. Mohamed Nawayi Revision No. 13 of 2021, Hon. Mahimbali, J. at page 4** to snarl his point. The counsel continued that, if at all, such defect can be cured by overriding objective principle as it does not go to the root of the matter.

He finalised his argument by arguing that the said form is merely intended to request the CMA to expediciouly prepare the certified copies of proceedings and award and forward the same to the High Court Labour Division. In his view, they were not intended to move the High Court in regard to determing the revision before it and if that was the case the said requirement would have been made under the rules of his honourable court not CMA.

For him, compaing the form with notice of Appeal is irrational, because , the notice of Appeal clearly eminates from the Court of Appeal Rules, thus, institutes an appeal providing details of the nature of the order to be appealed against and provides for time within which to file the same. The case of **Tanzania Revenue Authority v. Mulamuzi Byabusha** (supra) was cited to fortify his arguement. He continued that as for the notice of

appeal under court of appeal Rules, one cannot have access to Court of Appeal without the said notice of appeal, but that is lacking in CMA form No. 10. Thus, the two are distinguishable. He then prayed for this Court to overrule the prelimanry objeciton and resort to substantive justice by hearing the matter on merrits.

In rejoinder Mr. Masumbuko submitted that decisions he cited are not irrational. He stated that there are reasons for the decisions. He continued that in the rules of stare decisis one have to choose which is more rational. As all the decisions cited by both sides are of this same court, hence not binding upon this same court but merly persuasive. He stated that the **Tanzania Revenue Authority Vs. Mulamuzi Byabusha** (supra) decision that the CMA form No. 10 is for management rules are distinguishable from what is usually made for management purposes only because the form makes part of the records. In his view, it is a mandatory form tobe filed before coming to this court. Hence, this Court has to choose not to be bound by the decision cited by the applicants counsel.

He submitted that the above decision he cited explained that the form is for instituting the matter, hence mandatory as all other CMA forms are. In his view, all the forms are not for management , should one separate form 10 to be for mangement, it will lead to absurdity. He urged the court to see the reason to depart from the decision those decisions.

On the issue of evidence he submitted that it is not disputed whether the form was filed or not. He stated that the form is not attached to the

pleadings and not served on the other party as required. In his view its absence could only be grasped from the records. He submitted that the form's intention is to inform CMA of intention of the party to file revision. For him it intiates revision just as notice of appeal, since both are part of records of proceedings and so this fact cannot be ignored. He stated that notice of appeal have the same features and same requirement with this form.

He continued further that overriding principles is not to be applied generally in Labour Court as it was in CMA. He stated that we have specific rules in the area and so no lacuna for that matter. He submitted that, the principle cannot be appleid blindly when there is procedural requirement to comply with as it is not to be used to condone laxity. He specified that it is a mandatory form before filing the revision. Lastly he cemented that provided the rule was made under GN No. 47/2017 no need to question as to why not in the other GNs. He specified the form has to be filed at CMA that is why it was more preferable to included it there. He then reiterated his prayer for the application to be struck out.

After perusal of the submissions of both parties, based on the nature of the objection raised, the main question for determination by this court is *whether notice of intention to seek for revision of award (CMA F. 10) is a mandatory requirement.*

The law under regulation 34(1) of Employment and Labour Relations (General) GN. No. 47 of 2007 states that: -

"The forms set out in the Third Schedule to these Regulation ***shall be used in all matters to which they refer (emphasis is mine)"***

It is noted through a thorough examination of the numerous cases by this court as cited by counsels of both sides that there is conflicting decisions in this subject. All the cited cases are of this court and therefore they are not binding upon me but merly persuasive. I am alive to the fact that the fellow Judge's decision is not to be departed from so lightly, but when there is conflicting decisions like in this case reasons for chossing one position over the other has to be clearly stipulated. Derived from critical thinking of the wording of the rule quoted above, the use of the word shall inclines me to the school of thought that consideres the filling of the said notice, CMA form No. 10 as important and mandatory as advocated by Mr. Masumbuko. In my considered view such connotation alone makes the form to be mandatory and thus irretional to think that the provision was put there just for the sake of it or for a lesser purpose that initiating the application to this court. I am persuated with the decision by Mganga, J. in in **Anthony John Kazembe (supra)** and others in that line of argument which equates the form to the notice of appeal under the Court of Appeal Rules. That is what it is reading from its title '*Notice of Intention to Seek for Revision of Award'.*

The advocate for the applicant stated that the form is intended to be filed at CMA and thus it is not part of records here. With due respect, I beg to differ with him bacause, provided it initiates the proceedings before this

court from the CMA, place of filing becomes immaterial. It will always count as part of record provided, no matter where filed as long as it is filed within the dictates of the law.

For the reason, the application is not competent before me for lack of compliance with regulation 34(1) of G.N. No. 47 of 2017 by the applicant. It is therefore struck out. No order as to costs.

M. P. OPIYO,

JUDGE

29/03/2023