

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

REVISION APPLICATION NO. 426 OF 2022

*(Arising from the Ruling delivered on 1/11/2022 by Hon. Igogo, M, Arbitrator, in Labour dispute No.
CMA/DSM/ILA/1205/18 at Ilala)*

RAPHAEL M. LUKANDA APPLICANT

VERSUS

ETG LOGISTICS LIMITED RESPONDENT

JUDGMENT

*Date of last Order: 08/03/2023
Date of Judgment: 30/03/2023*

B. E. K. Mganga, J.

Facts of this application briefly are that on 22nd August 2017, respondent employed the applicant as Customer care Service Executive. It is said that on 09th November 2018, respondent terminated employment of the applicant. Aggrieved with termination, applicant filed Labour dispute No. CMA/DSM/ILA/1205/18 before the Commission for Mediation and Arbitration at Ilala. It happened that respondent failed to enter appearance during Mediation, as a result, on 14th January 2019 the mediator issued ex-parte award of TZS 47,155,676/= in favour of the applicant.

Respondent filed an application to set aside an ex-parte award. In unprecedented way, on 27th February 2021, Hon. Lemwely, D, Mediator, issued ex-parte ruling granting the application by the respondent and set aside the aforementioned ex-parte award and ordered parties to appear before him for mediation. Applicant filed an application to set aside the said ex-parte ruling but before deciding on the application by the applicant, the mediator issued an order that she has no jurisdiction and ordered the parties to appear before the arbitrator. When the parties appeared before the arbitrator, another dramatical change happened. At this time, respondent raised a preliminary objection that applicant took more than thirty days from the day mediation fail i.e., from the date they were ordered to go to the arbitrator to the date applicant filed a referral form for arbitration. On 11th November 2022, Hon. Igogo, M, Arbitrator, issued a ruling sustaining the preliminary objection that the dispute was time barred.

Applicant was aggrieved with the said ruling hence this application for revision. In the affidavit in support of the application, applicant raised four grounds namely:-

- 1. That, the Commission erred in law and facts to issue a non-settlement certificate(CMA F6) before hearing and determination of the dispute.*
- 2. That the Commission erred in law and facts to issue non settlement certificate(CMA F6) prior to mediation process.*

3. That the Commission erred in law and facts by denying applicant right to representation by forcing personal representative of the applicant out.

4. That, the Commission erred in law and facts by failure to hear the dispute, denied applicant right to be heard.

Respondent filed both the Notice of Opposition and the Counter affidavit resisting the application.

When the application was called on for hearing, Mr. Dominic John, Personal Representative appeared and argued for and on behalf of the applicant while Mr. Respicious Mkandala, learned Advocate appeared and argued for and on behalf of the respondent.

In his submissions, Mr. John, personal representative of the applicant submitted generally that applicant was terminated on 09th November 2018 but he cannot recall as to when applicant filed the dispute at CMA. Mr. John submitted further that, Mediator erred to issue CMA F6 prior to hearing the parties and added that applicant did not sign the said CMA F6. Brief as he was, Mr. John opted to leave other grounds to the Court to consider so that justice can be done.

Resisting the application, Mr. Mkandala, learned counsel for the respondent, submitted that the dispute relating to unfair termination between the parties arose in 2018. Counsel submitted further that, on 23rd November 2018, applicant referred the dispute at CMA where it was heard ex-parte and an ex-parte award was issued in favour of the applicant. He went on that, while in possession of an ex-parte award,

applicant filed Execution application before this court and notified the respondent. That, following that information, respondent filed Revision No. 45 of 2019 that was later on withdrawn. After withdrawal of the said revision No. 45 of 2019, respondent filed an application for extension of time to set aside the ex-parte award. On 27th February 2021, an application to set aside ex-parte award was granted by Lamwely D, Mediator, who ordered parties to appear before him on 02nd March 2021 for mediation. Counsel for the respondent submitted further that, applicant did not enter appearance on the date scheduled for mediation. Instead, the parties appeared on 05th April 2022 for mediation. He went on that, applicant and one Joseph John Mumanda, Personal Representative appeared and that the later informed the mediator that he was holding brief of Steven Minde, Personal Representative. He submitted further that, Deodat Michael and Meheroon Kassu, all Human Resource officers appeared on behalf of the respondent. Counsel submitted further that, those who appeared on behalf of the respondent had nothing to offer, as a result, it was recorded that mediation has failed. He went on that, after failure of mediation, respondent signed CMA F6 but applicant refused to sign.

Counsel for the respondent submitted that, after failure of mediation, applicant was supposed to refer the dispute to the arbitrator for arbitration, but he didn't. Mr. Mkandala went on that, between April 2022 and May 2022, parties

appeared before Hon. Igogo, Arbitrator for arbitration. That, while the matter was before the arbitrator, respondent filed the notice of preliminary objection that the matter was referred to arbitration out of time. Mr. Mkandala learned counsel for the respondent submitted further that, applicant was supposed to file the dispute for arbitration within 30 days from the date mediation failed as provided for under Rule No. 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007. Counsel submitted that, based on the said Rule, the arbitrator upheld the preliminary objection that the dispute was time barred. Counsel for the applicant prayed that the application be dismissed.

Counsel for the respondent submitted further that applicant was afforded right to be heard during mediation. He went on that; CMA record does not show that personal representative of the applicant was removed or was prevented to participate in mediation. He added that, there is no Police Officer who arrested the personal representative of the applicant.

In rejoinder submissions, Mr. John, personal representative of the applicant had nothing to add.

I have carefully examined evidence in the CMA record and considered submissions of the parties in this application and find that on 23rd November 2018, applicant filed CMA F1 claiming to be paid TZS 42,963,960/= being 12 months'

salaries compensation for unfair termination and notice. The CMA record shows further that, on 12th and 18th December 2018 applicant appeared before Hon. Lemwely, D, Mediator, but respondent did not enter appearance. The CMA record shows further that, on 10th January 2019, applicant appeared again before Hon. Lemwely, D, Mediator, but respondent did not show up, as a result, issues were drafted, applicant was heard ex-parte and the mediator issued an order that ex-parte award will be issued on **9th February 2019**. To my surprise, the CMA record shows that ex-parte award was issued on **14th January 2019** by Hon. Lemwely, D, Mediator. In the said ex-parte award, applicant was awarded to be paid (i) TZS 3,304,920/= being salary payment in lieu of notice, (ii) TZS 3,304,920/= being leave pay, (iii) TZS 39,656,040/= being 12 months' salaries compensation and (iv) TZS 889,796/= being severance pay all amounting to TZS 47,155,676/=.

In order to enforce the said ex-parte award, applicant filed Execution No. 158 of 2019 before this court and served the respondent with the application. Upon being served with application for execution, on 23rd April 2019, respondent filed before CMA an application for extension of time within which to set aside the aforementioned ex-parte award complaining that she was not served. On 20th June 2019, applicant filed both the Notice of Opposition and the counter affidavit opposing the application. The record shows further that, in the said application, respondent was being represented

by Aidan Kitare, advocate while applicant was represented by Steven Minde, Personal Representative. On 11th September 2019, Hon. Lemwely, D, Mediator, granted an application for extension of time filed by the respondent.

It is on the CMA record that, on 15th October 2019, respondent filed an application to set aside the aforementioned ex-parte award. It is not known and there is no record showing what transpired soon after respondent filing an application to set aside ex-parte award because the CMA record is silent. It is not known as to whether respondent served the applicant with the application to set aside ex-parte award. The record shows that, on 19th October 2020, after one year, respondent filed an affidavit sworn on 2nd September 2020 by Charles Kajala Sengo, Court process server showing that he served the applicant through Daniel Ngalawa, the chairman of Local Authority at Kisiwani street Bonyokwa Ward, Kimara area within Ilala District where applicant resides. Again, apart from the said affidavit of service, in the CMA record, there is service by publication through Mwananchi newspaper dated 19th November 2020. I have examined the CMA record and find that there is no record showing as to when respondent prayed for substituted service and the date the said order was granted by the Mediator. It is only shown in the record that on 14th December 2020, Mr. Respiciuos Mkandala appeared before Hon. Lemwely, D, Mediator, in absence of the applicant, and submitted that respondent

has served applicant through Mwananchi Newspaper and prayed to proceed ex-parte. The Mediator adjourned the matter to 27th January 2021 but on the later date, applicant was also not present, as a result, the application was heard ex-parte. Having heard the respondent ex-parte, the Mediator issued an order that the ruling will be delivered on 27th February 2021. On 27th February 2021, Hon. Lemwely, D, Mediator, granted the application filed by the respondent by setting aside the aforementioned ex-parte award and ordered parties to appear before him for mediation on 30th February 2021 at 11:00hrs. I should point out albeit briefly that, strange as it is, 30th day of February did not exist and will never exist. There is no year with 30 days in the month of February. In fact, the year 2021 had only 28 days. It is my view that, there is a typing error in that Ruling.

The CMA record also shows that on 20th August 2021, applicant filed at CMA the notice of Opposition and his counter affidavit opposing an application filed by the respondent to set aside an ex-parte award. In his affidavit, applicant stated that on **9th August 2021** he was served with the application to set aside the ex-parte award. As pointed hereinabove, the said ex-parte award was set aside on 27th February 2021 by Hon. Lemwely D, Mediator, who heard it ex-parte. It is also clear from the counter affidavit of the applicant that he was served with the application on 9th August 2021 while already Hon. Lemwely, D, Mediator has heard the application

by the respondent ex-parte on 27th January 2021 and granted the application on 27th February 2021. I should point out at this juncture that, there is no proceeding in the CMA record showing what transpired from 27th February 2021, the date the Mediator issued ex-parte ruling setting aside an ex-parte award. More so, it is not indicated in the CMA proceedings whether parties or one of the parties appeared before the Mediator as it was ordered on 27th February 2021. From 27th February 2021, proceedings are silent until on 26th January 2022, when applicant filed an application to set aside Ex-parte ruling dated 27th February 2021 that set aside ex-parte award. In his affidavit in support of the application, applicant stated *inter-alia* that, he was not served with the application to set aside ex-parte award and that he was served with the ex-parte ruling on 25th January 2022.

The CMA record shows that on 7th March 2022, applicant appeared before Hon. Lemwely, D, Mediator, but respondent was absent, as a result, the matter was adjourned to 17th March 2022. On the later date, all parties appeared but respondent prayed for adjournment, as a result, the matter was adjourned to 28th March 2022 at 11:00 hrs. On 28th March 2022, applicant wrote a letter to the Mediator praying for adjournment on ground that on the same date at 09:00hrs he(applicant) will be chairing a meeting at his new employer. In the same letter, applicant warned the mediator to be careful with the respondent, allegedly, that the latter intends to

obstruct justice so that the application can be dismissed. With that letter, only Mr. Mkandala, advocate for the respondent entered appearance, as a result, the application was adjourned to 5th April 2022. On 5th April 2022 proceedings shows as hereunder:-

Akidi: Mn Lemwely

M kaji: Rafael Mogela

Joseph Mmanda – P.R

M kiwa: Respicious Mkandara-Adv

Deodat Maiko S. Meken-HR

Hall: MED

Hali ya shauri

- *Shauri hili limekuwa na mahairisho ya kila siku bila kusikilizwa.*
- *Ushuluhishi ktk hatua hii umeshindikana lakini upande wa mlalamikaji umegoma kusaini fomu No.6 hadi maombi yao ya tarehe 26/1/22 yasikilizwe ili haki itendeke.*
- *Kwa kuwa tume haina mamlaka ya kusikiliza maombi hayo tume imeruhusu shauri liende hatua ya pili.*
- *Shauri limeenda hatua ya pili*

Sgd

05/4/2022.

In short, having recorded the attendance, the Mediator informed the parties that the matter was adjourned for several days without being heard. The Mediator recorded further that mediation has failed but one side has refused to sign Form No. 6 until an

application that was filed on 26th January 2022 is heard in order justice to be done. The Mediator gave an order for the dispute to go to the arbitration stage because she had no jurisdiction over the dispute.

The CMA record shows that, on 5th April 2022 Respecious R. Sylivester Mkandala, advocate for the respondent signed a certificate of non-settlement (CMA F6) in presence of Hon. Lemwely D, the Mediator and the mediator recorded on the said form that applicant refused to sign. The record further shows that, on 13th May 2022, applicant filed a Notice to refer a dispute to Arbitrator (CMA F8) and on 16th May 2022, Linda Anthony, signed summons notifying the parties that they should appear on 13th June 2022 at 12:00hrs. I should point out that, I have examined the CMA record and find that there are no proceedings for 13th June 2022. The record shows that, on 29th July 2022, Mr. Steven Minde, personal representative of the applicant and Respicious Mkandala and Kelvin Lubago, advocates for the respondent appeared before Hon. Igogo, M, Arbitrator who ordered the parties to file opening statements and drafted issues by 12th August 2022 and adjourned the dispute to 19th August 2022. I have examined the CMA record and find that applicant complied with the order and filed his opening statement and issues on 19th August 2022 but respondent did not.

The CMA record shows further that on 19th August 2022, Mr. Steven Minde, the personal representative of the applicant and Respicious Mkandala and Kelvin Lubago,

advocates for the respondent appeared before the Arbitrator. Counsel for the respondent prayed to be supplied with CMA F1 of which, Mr. Minde, personal representative of the applicant promised to supply arguing that he was not in possession of the said CMA F1 on the material day because applicant was on safari. Due to that, the matter was adjourned to 9th September 2022. The CMA record shows that, on 7th September 2022, CMA received undated letter from the applicant praying for perusal of the CMA record and that he should be permitted himself and his personal representative to take copies of documents including CMA F1 because on 4th May 2022 one Nyerere, a police officer, took the said CMA F1 by force from the applicant and gave Mr. Deodat Michael, the Human resources officer of the respondent. On 19th September 2022, Hon. Igogo, M, Arbitrator, ordered the parties to take copies of the CMA F1 from the CMA file. The arbitrator further ordered the parties to file opening statement and issues by 3rd October 2022. Both parties complied with the order. Together with the opening statement, respondent filed a preliminary objection that the matter was time barred.

The record shows further that, on 10th October 2022, Mr. Mkandala, advocate for the respondent submitted in support of the preliminary objection that applicant was supposed to file referral form within 30 days from the date mediation failed namely from 5th April 2022 but he filed the referral form on 13th May 2022 while out of time for 8 days. It was further submitted by counsel for the respondent at CMA that, there is no

provisions in Labour Statutes prescribing time within which a person can file a referral for arbitration after failure of mediation.

On his part, Steven Minde, personal representative of the applicant submitted that CMA F6 was issued while there was a pending application for the applicant to set aside ex-parte ruling that set aside ex-parte award. He submitted further that, CMA F6 was issued to the applicant in presence of one Nyerere, a police officer, who arrested applicant on the same date, detained him at Dar es Salaam Central police and took the said CMA F6 by force from the applicant.

In rejoinder, Mr. Mkandala, counsel for the respondent, conceded that on the same date, applicant was arrested by police officer while at CMA compounds in relation to police case file No. CD/IR/865/2021. Counsel for the respondent submitted further that, applicant was arrested for allegations that he forged the signature of the respondent that led to obtaining an ex-parte award.

Having heard submissions of the parties, on 11th November 2022, Hon. Igogo, M, Arbitrator, delivered a ruling upholding the preliminary objection by the respondent that the referral form for arbitration (CMA F6) was filed out of time and dismissed the dispute.

It is undisputed from the foregoing facts that initially Lemwely, D, Mediator, issued an ex-parte award in favour of the applicant and that the said mediator issued ex-parte ruling setting aside the ex-parte award in favour of the respondent. It is also undisputed that applicant filed an application to set aside the said ex-parte ruling that set aside the ex-parte award arguing that he was not served. It is further undisputed that the mediator referred the parties to arbitration stage stating that mediation has failed and that she has no jurisdiction prior determination of the application by the applicant to set aside ex-parte ruling that set aside ex-parte award. It is also undisputed by the parties that, applicant refused to sign a non-settlement agreement because the mediator had not determined his application to set aside ex-parte ruling that set aside an ex-parte award. Not only that , but also, it is also a common ground to the parties that applicant was arrested while at the vicinity of CMA and detained at police. It is not on record as to when applicant was discharged from police lock up. It is clear from the CMA ruling dated 1st November 2022 by Hon. Igogo, M, Arbitrator, that applicant filed the referral form for arbitration while out of time for 9 days. I have carefully read the said ruling and find that the complaint by the applicant that the mediator gave an order that mediation has failed prior determination of his application to set aside the ex-parte ruling

that set aside ex-parte award was not determined. It is my view, that the Mediator having declared herself that she had no jurisdiction over the dispute, then, all orders and awards that were issued before cannot be left to stand. In my view, those orders and awards can only be corrected or revised by this court because all what were done were a nullity. In my view, the Mediator has no powers to do what she did in this application. It is my further view that neither the Mediator nor the Arbitrator has power to nullify those proceedings and set aside the awards and orders arising therefrom. That can only be done by this court as I hereby do.

Again, in the ruling by the arbitrator upholding the preliminary objection raised by the respondent that applicant filed the referral form for arbitration out of time for 9 days, the arbitrator did not consider the undisputed facts that applicant was arrested by a police officer while in the vicinity of CMA. More so, the complaint by applicant that the said police officer took by force CMA F6 from the applicant and gave it to Mr. Deodat Michael, the Human resources officer of the respondent was not disputed. It is my view that arbitrator erred for her failure to consider that issue before dismissing the dispute for being out of time. It is my view that, submission by counsel for the respondent that applicant was arrested in connection with the matter that was

pending at CMA, allegedly, that he forged a signature of the respondent was a wakeup call to the arbitrator to scrutinize the matter objectively. It is my view that, the arbitrator was supposed to consider submissions that were made on behalf of the applicant that a police officer who arrested the applicant, forcefully, took the said referral Form from the applicant hence in no way the latter could have filed the referral within time. As pointed hereinabove, it is unknown as to when applicant was released from custody for the court to blame applicant for the delay. That alone, in my view, is sufficient ground to allow this application. For all said hereinabove, I can briefly say that, both parties played a foul game, which is why, they found themselves in this state of affairs. Both parties and the Mediator, should know that dirty games in administration of justice are not permissible. I should point further that, on some occasions, they may find themselves in an angle that they will not believe their eyes and hears. As for now, my cordial advice to them is that they should stick to the rules of the game without twisting facts that are not on their side to be in their favour.

For all what I have pointed hereinabove, I nullify all CMA proceedings conducted by Lamwely, D, Mediator, set aside all the award, ruling and orders arising therefrom. I further nullify all proceedings conducted by Hon. Igogo, M,

Arbitrator and set aside the ruling that dismissed the application for the applicant for being time barred. I direct the parties to go back to CMA so that the dispute can be properly mediated by a different Mediator and upon failure of mediation, the dispute be referred to a different arbitrator other than Hon. Igogo, M, for arbitration without delay.

Dated at Dar es Salaam on this 30th March 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 30th March 2023 in chambers in the presence of Dominic John Mzena, personal Representative of the Applicant and Respiciuos Mkandala, Advocate, for the respondent.



B. E. K. Mganga
JUDGE