IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 53 OF 2023

(Originating from the Ruling of the Commission for Mediation and Arbitration at Kinondoni in Labour Dispute No. CMA/DSM/KIN/548/2022, Hon. Johnson Faraja, L, Arbitrator dated 19th January 2023)

LUCKY GAMES LIMITED ..... APPLICANT

VERSUS

SALIM MADATI ..... RESPONDENT

RULING

Date of last order: 22/05/2023
Date of Ruling:29/05/2023

B. E. K. Mganga, J.

This ruling is in respect of preliminary objections raised by Salim Madati, the respondent, challenging the application filed by Lucky Games Limited, the applicant who is seeking the court to Revise CMA Award dated 19th January 2023.

Before discussing on the preliminary objection raised, I find it prudent to narrate briefly the facts of this Revision application. Respondent had a ten years fixed term contract of employment with the applicant starting from 1st January 2017. It happened that on 24th May 2018, applicant terminated employment of the respondent who was on probationary period allegedly, due to unsatisfactory performance.

Aggrieved by termination of his employment, on 19th June 2018, respondent filed a referral of a dispute to the Commission for Mediation and Arbitration (CMA) complaining that applicant terminated his employment unfairly. In the CMA F1, respondent indicated that he was claiming to be paid compensation for unfair termination and damages for breach of terms of contract of employment. At CMA, respondent emerged as a winner and was awarded to be paid USD 84,500 as compensation.

Applicant was aggrieved by the said CMA award, as a result, she filed revision application No. 105 of 2021 before this court. On 26th March 2022, this court (Hon. S.M. Maghimbi, J) delivered the judgment in favor of the applicant and held that the dispute was wrongly initiated under the claim of unfair termination because respondent was a probationary employee who had worked for less than six months. On 17th August 2022, respondent went back to CMA where he filed an application for condonation with a view of filing a fresh complaint based on breach of contract of employment. Together with the CMA F1, respondent filed an application for condonation (CMA F2) supported with his affidavit. In the affidavit in support of the application for

condonation, applicant stated that he was in the court corridors for four years pursuing his rights and that, there was technical delay.

In resisting the application for condonation, applicant filed the counter affidavit and raised a preliminary objection that the matter was *res judicata*.

On 19th January 2023, having heard submissions of both sides, Hon. Johnson Faraja L, Arbitrator, delivered a ruling with findings that respondent was pursuing his case from the beginning to the end from day one where he filed a wrong dispute to the day it was dismissed. Based on those findings, the arbitrator granted the application for condonation.

Applicant was aggrieved by the said ruling hence this revision application seeking the court to revise the said ruling. In support of the notice of application for revision, applicant raised two grounds namely: -

1. *In the CMA Form No. 1, the Respondent stated that the nature of the dispute was breach of contract and breach of basic employee's rights by the employer and creating intolerable working conditions from 14th May, 2018. Bringing a fresh complaint amounts to res judicata and abuse of court process.*
2. *The Labour Court in Revision No. 105 of 2021: Lucky Games Limited v. Salim Madati having held that the dispute was initiated under the claim of unfair termination and that Section 35 of the ELRA was not applicable to probationary employees who had worked for less than six months, the Respondent is not entitled to file a fresh complaint in the Commission for Mediation and Arbitration based on breach of the Respondent's contract of employment.*

Respondent filed the counter affidavit together with a notice of Preliminary Objection opposing the application that: -

1. *Respondent argued that the application for Revision is incurably defective as it contravenes Rule 50 of the Labour Court Rules, GN. No.106 of 2007 and*
2. *that the application is bad in law, fatal and incompetent for contravening Section 91(1) of the Employment and Labour Relations Act, Chapter 366, [R.E,2019].*

When the application was called on for hearing, Dr. Onesmo, Kyauke, learned Advocate, appeared and argued for and on behalf of the applicant while Mr. Said Nassoro, Advocate, appeared and argued for and on behalf of the respondent.

In his submissions to support the preliminary objections, Mr. Nassoro submitted that, the application is defective because it contravenes Rule 50 of the Labour Court Rules, GN. No. 106 of 2007 which prohibits a party to appeal or file revision against interlocutory orders. Counsel submitted further that, respondent was granted application for condonation at CMA and that the said ruling is interlocutory as it did not determine rights of the parties to its finality. To support his assertion, he cited the case of ***Vodacom Tanzania Public Limited Company v. Planet Communications Limited,*** Civil Appeal No. 43 of 2018 CAT (reported). Counsel submitted further that,

in an application for condonation, respondent was praying CMA to extend its jurisdiction to hear the dispute that was filed out of time.

Counsel for the respondent went on that, dispute No. CMA/DSM/KIN/548/2022 which was filed on 30th September 2019 is pending for hearing at CMA hence the ruling granting condonation is interlocutory. Counsel added that, for the matter not to be interlocutory, rights of the parties must be determined on merit. Counsel cited the case of *Equity Bank (T) Ltd. v. Abuhussein J. Mvungi* Revision No. 62 of 2019, *Theresia Moshi v. Cornelius Secondary School,* Revision No. 401 of 2021, HC (unreported) and *Ultimate Security (T) Ltd v. Joseph Goliana & 2 others,* Revision No. 430 of 2021, HC (unreported) to support his submissions that a ruling granting condonation is interlocutory.

On the 2nd Preliminary objection that the application has contravened Section 91(1) of CAP 366 R.E. 2019, Counsel submitted that, the said provision refers to arbitral award. Counsel added that, in Black's law dictionary, 11th Edition by Bryan A. Garner, arbitral award is defined as final decision by an arbitrator or panel of arbitrators. Counsel submitted further that, applicant intends to challenge a ruling and not an arbitral award meaning that the rights of the parties were not

determined to its finality. During submissions, counsel for the respondent conceded that there is no provision that can be used by a party aggrieved with CMA ruling. He however maintained that, Section 91(1) of Cap. 366 R.E is not applicable in this application and prayed that the application be struck out.

Responding to the 1st preliminary objections, Dr. Kyauke, submitted that, the ruling granting condonation is not interlocutory because it is not a ruling arising in the Course of the proceedings. The ruling granting condonation was final and that applicant had a right to file an application for revision. Dr. Kyauke added that, application for condonation was filed on 30th September 2022 and that, before the grant of condonation, CMA had no jurisdiction to determine the dispute between the parties. Counsel for the applicant insisted that, there was no dispute at CMA before the grant of condonation for the Court to hold that the ruling is interlocutory. He submitted further that, after grant of the application for condonation, there was nothing that remained pending at CMA and that the cases cited by Counsel for the respondent were distinguishable hence inapplicable. Counsel for the applicant submitted further that, the Court may depart from its previous decisions on ground that there was an error on face of record.

Responding to the 2nd preliminary objection, counsel for the applicant submitted that, there is a *lacuna* in the Employment and Labour Relations Act [Cap. 366 R.E. 2019] because, there is no provision that can be used by the aggrieved party to challenge the ruling CMA that is not arbitral award. Counsel for the applicant concluded by praying that the preliminary objections be dismissed.

This court having perused the CMA record, suo moto raised one legal issue namely; whether CMA at Kinondoni where respondent filed an application for condonation had jurisdiction to determine that application. The court invited the parties to address that issue in their submissions.

Responding to the jurisdictional issue raised by the court, Mr. Nassoro, learned counsel for the respondent, initially submitted that CMA at Kinondoni had jurisdiction. Counsel submitted further that, dispute arose in 2018 and in the affidavit in support of condonation, respondent indicated that the offices of the applicant were at Kariakoo and that even the contract annexed to the application shows that applicant's offices was at Kariakoo. Upon reflection, counsel for the respondent conceded that respondent was working at Kariakoo within

Ilala District and not within Kinondoni District and concluded that the dispute arose within Ilala district.

Dr. Kyauke, learned counsel for the applicant responding to the jurisdictional issue raised by the court submitted that, in the 1st complaint, respondent filed dispute No. CMA/DSM/ILA/R.662/18/466 at Ilala because the dispute arose within Ilala District. He submitted further that, after nullification of proceedings by the High Court, respondent filed dispute No. CMA/DSM/KIN/548/2022 at Kinondoni which is a different district. Counsel for the applicant concluded that, CMA at Kinondoni had no jurisdiction to grant condonation because it was filed in an area different from where the dispute arose.

In rejoinder submission in support of the preliminary objections, counsel for the respondent submitted that, at CMA, application for condonation (CMA F2) and the dispute (CMA F1) are filed together. He however, conceded that, the dispute is filed after grant of condonation.

Having considered submissions made on behalf of the parties in relation to the preliminary objections raised by the respondent and the jurisdictional issue raised by the court, it is now my turn to deliver my ruling. In this ruling, I will first consider preliminary objections raised by

the respondent before considering the jurisdictional issue raised by the court.

It was submitted by counsel for the respondent that the ruling granting condonation is interlocutory but counsel for the applicant had a different view. I should point out from the start that, in the application at hand, I not inverting the wheel as to what is interlocutory order and the test thereof. The test whether an order or ruling is interlocutory or not, was given by the Court of Appeal in the case of ***Tanzania Motor Services Ltd & Another v. Mehar Singh t/a Thaker Singh,*** Civil Appeal No. 115 of 2006, wherein it held: -

> *"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."*

Again, in the case of ***Commissioner General Tanzania Revenue Authority & Another vs Milambo Limited*** (Civil Appeal No. 62 of 2022) [2022] TZCA 348 the Court of Appeal held:-

> *"What constitutes an interlocutory order is the decision of the Court which does not deal with the finality of the case but settles subordinate issues relating to the main subject matter which may be necessary to decide during the pendency of the case due to time sensitivity of those issues. See:https://lawgic.info. Interlocutory order."*

In ***Milambo's case*** (supra), the court of Appeal went on that: -

"In our jurisdiction, the Court has embraced the principle of the "nature of order test" to detect as to whether the order is interlocutory or not. See the case of ***MURTAZA ALLY MANGUNGU VS RETURNING OFFICER FOR KILWA AND TWO OTHERS,*** *Civil Appeal No. 80 of 2016,* ***JUNACO (T) LIMITED AND JUSTIN LAMBERT VS HAREL MALLAC TANZANIA LIMITED,*** *Civil Application No. 473/16 of 2016,* ***THE DIRECTOR OF PUBLIC PROSECUTIONS VS. FARIDI HADI AHMEND AND 36 OTHERS****, Criminal Appeal No. 205 of 2021 and* ***PETER NOEL KINGAMKONO VS TROPICAL PESTICIDES,*** *Civil Application No. 2 of 2009 (all unreported)."*

In ***Milambo's case*** (supra), the court of Appeal went on to quote its decision in **Kingamkono's case** (supra) that: -

"...it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply "the nature of order test". That is, to ask oneself whether the judgment or order complained of finally disposes of the rights of the parties. If the answer is in the affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order."

In ***Milombo's case*** (supra), the Court of Appeal further quoted it decision in the case of ***TANZANIA POSTS COPRORATION VS JEREMIAH MWANDI***, Civil Appeal No. 474 of 2020 (unreported) as to what must be considered in testing 'the nature of order test" as follows:-

"That test requires answers to more or less two questions in the context of the matter before us; ***one,*** *what were the remedies that were sought or the rights that the respondent was seeking to enforce or obtain from the High Court? And* ***two,*** *were all such rights or remedies conclusively determined by the High Court or there are certain matters in relation to the same rights that remained pending for determination at the*

High Court? .... if the answer to question two is that everything at the High Court was finally and conclusively wound up, the decree in revision would be a final decree and the bar at section 5 (2) (d) of the AJA will not apply. Conversely, if the decree in revision by the High Court left an issue or issues at the same court (the High Court) undetermined, then the decree in revision is an interlocutory order and this Court will not have jurisdiction to determine the present appeal…"

In ***Milambo's case*** (supra), having quoted its various decisions, the Court of Appeal concluded that: -

"In the premises, the "nature of order test" is squarely applicable in this matter and as such, we are satisfied that, following the grant of the application for enlargement of time to apply leave to seek prerogative orders, the remedy sought by the respondent was finally and conclusively determined…Therefore, in the matter under scrutiny, since the respondent was granted reliefs sought on enlargement of time to apply leave to seek prerogative writs, the matter was wound up and as such, the respective ruling is not an interlocutory order at any stretch of imagination."

Now, in the application at hand, it was submitted by counsel for the respondent that the ruling granting condonation by the arbitrator is interlocutory not subject to revision in terms of Rule 50 of GN. No. 106 of 2007 (supra). It is my considered opinion that, the application for condonation is a separate application from the dispute intended to be filed by the person seeking condonation. Therefore, in applying the "nature of order test" explained hereinabove, the ruling and order granting condonation, in my view, cannot be interlocutory order. I am of that view because, in an application for condonation, applicant filed the

affidavit stating reasons for the delay and respondent must, if resisting the application, file the counter affidavit. In my view, once a ruling is delivered either granting or dismissing the application for condonation, then, that becomes the end of the application. After delivery of the ruling granting or dismissing the application for condonation, the whole application becomes disposed. In other words, nothing remains pending for determination before the arbitrator.

I should point out that, in granting or dismissing the application for condonation, the main issue before the arbitrator is whether, applicant had good cause or reason for delay. Once that issue is answered either in affirmative or negative, then, the application is decided to its finality. Nothing can be left for it to be said that the application has not been finally determined. If the application is dismissed, it is open to the applicant to file an application for revision before this High court and that is acceptable. The logic is simple, namely, the application was decided to its finality against the applicant. As a matter of fact, if the application for condonation is decided against the respondent, then, it is also decided to its finality. Therefore, respondent had an option to file application for revision. To hold otherwise, in my view, is treating the parties in the same application with double standard namely, granting

the party who filed an application for condonation right to file revision but denying the same right to the respondent. It is my considered view that, parties in the same proceedings must be treated equally.

I should add that, at the time of filing an application for condonation, applicant is also required to file the Referral Form (CMA F1) that initiates proceedings at CMA. At that stage, in my view, there is no dispute that is properly filed at CMA because mere filing of CMA F1 does not cloth CMA with jurisdiction that it lacked due to limitation of time. Therefore, at the time of granting condonation, it cannot be said that there is a dispute that is pending before CMA. CMA becomes seized with jurisdiction after granting the application for condonation. It is therefore, a misconception, in my view, to say that there was a pending dispute at the time of granting an application for condonation. I therefore overrule the 1st preliminary objection.

On the 2nd preliminary objection, both parties were in agreement that there is a lacuna in the Employment and Labour Relations Act [Cap. 366 R.E. 2019] due to absence of a provision enabling the aggrieved party to challenge a ruling issued by the arbitrator at CMA. I agree with them that there is such no specific provision in Cap. 366 R.E. 2019(supra). Section 91(1) of Cap. 366 R.E. 2019 (supra)covers

situations where a party intend to challenge an arbitral award as it was correctly submitted by counsel for the respondent. Since there is a lacuna in the law, it is my view that, in order to give effect to the law, the word arbitral award in section 91(1) of Cap. 366 R.E. 2019(supra) should be interpreted to include ruling issued by arbitrators provided that, the said ruling is not interlocutory. It is my view, that this court has been widely so interpreting that said section, to enable the party aggrieved by the ruling of the arbitrator to seek remedy before this court. It is my view that, the court has declined to interpret section 91(1) narrowly in exclusion of ruling issued by arbitrators, which why, it has been entertaining revisions arising from ruling issued by arbitrators. In order to improve labour laws and keep clarity of those laws, I advise drafters of the law to consider and amend section 91(1) of Cap. 366 R.E. 2019 (supra) to cover situations where a party intend to challenge a ruling issued by the arbitrator. At the moment, aggrieved party should continue to resort to the provisions of section 91(1) Cap. 366 R.E. 2019(supra) until when the law will be amended. For the fore going, I overrule also the second preliminary objection.

On the jurisdictional issue which was raised by this court *suo motto,* it is undisputed by the parties that respondent was working

within Ilala district and that the dispute arose within Ilala district. It is my considered view that, respondent was supposed to file the dispute before CMA at Ilala as he previously did and not to file the dispute at Kinondoni. I am of that strong view because, the issue relating to where the dispute must be filed is clearly provided for under Rule 22(1) of Labour Institutions (Mediation and Arbitration) Rules, G. N. No. 64 of 2007 which provides that: -

> *22(1): - A dispute shall be mediated or arbitrated by the Commission at its office having responsibility for* ***the area in which the cause of action arose****, unless the Commission directs otherwise.* (emphasis is mine)

Since the dispute arose within Ilala district as indicated in the CMA F1, it was wrong for the respondent to file the dispute at Kinondoni. In short, CMA at Kinondoni has no jurisdiction. In other words, the arbitrator who issued a ruling granting an application for condonation filed by the respondent has no jurisdiction. There is no explanation in the CMA file as to why respondent filed the dispute at Kinondoni instead of Ilala. In my view, a person cannot be allowed to file a dispute to the place of his or her own choice but in disregard of the law. Since respondent filed the dispute at Kinondoni, a place other than where the dispute arose and in absence of direction from CMA, I hold that the arbitrator at Kinondoni had no jurisdiction to issue the

ruling granting respondent condonation. For the foregoing, I hereby nullify CMA proceedings, quash and set aside the ruling that granted respondent condonation.

Dated at Dar es Salaam on this 29th May 2023.

B. E. K. Mganga
JUDGE

Ruling delivered on this 29th May 2023 in chambers in the presence of Ms. Prisca Nchimbi, Advocate holding brief of Dr. Onesmo Kyauke, Advocate for the Applicant and Said Nassoro, Advocate for the Respondent.

B. E. K. Mganga
JUDGE