IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 180 OF 2023

(Arising from the Ruling delivered on 11/07/2023 by Hon. G.M. Gerald, Arbitrator, in Labour dispute No. CMA/DSM/KIN/482/2022 at Kinondoni)

CHACHA RYOBA SERONGA ..... 1ST APPLICANT

MARWA CHACHA MASASE ..... 2ND APPLICANT

JUMA KHAMIS MAKAMBA ..... 3RD APPLICANT

VERSUS

SGA SECURITY (T) LIMITED ..... RESPONDENT

EXPARTE JUDGMENT

Date of last Order: 03/10/2023
Date of judgment: 06/10/2023

B. E. K. Mganga, J.

Brief facts of this application are that, on 30th August 2022, Chacha R. Seronga, Marwa C. Manase and Juma K. Makamba, the herein applicants, jointly and together, signed the "Referral of a Dispute to the Commission (CMA F1) and on 31st August 2022, filed it before the Commission for Mediation and Arbitration henceforth CMA. In the said CMA F1, applicants indicated that, on 06th August 2022, SGA Security (T)

Limited, the herein respondent, unfairly terminated their employment. They further indicated in the said CMA F1 that they were claiming to be paid 12 months' salary compensation for unfair termination and notice. On fairness of procedure, applicants indicated that respondent did not afford them right to be heard and right to call their witnesses during the disciplinary hearing. In the said CMA F1, applicants did not fill the part relating to fairness of reason for termination. Applicants served the said CMA F1 to the respondent on 30th August 2022.

On 02nd September 2022, applicants appointed Chacha Ryoba Seronga, the 1st applicant, to file the dispute on their behalf and consented the said 1st applicant to sign all documents required to be filed at CMA and took oath on their behalf. Appointment of the 1st applicant to represent his co-applicant was duly signed by all applicants. On the same date, namely 02nd September 2022, applicants filled a new CMA F1 that was signed by the 1st applicant indicating that the dispute arose on 06th August 2022 and further that, applicants were unfairly terminated by the respondent. In the said CMA F1, 1st applicant indicated that they were claiming to be paid 24 months as compensation. On fairness of procedure, 1st applicant, indicated in the said CMA F1 that, respondent denied them right to be heard, right to be represented and other rights. On fairness of reason, he indicated that

there was no valid reason for termination. On the same date, 1st applicant filed the said CMA F1, a notice duly signed by all applicants appointing 1st applicant to be their representative, calculations showing the amount each applicant was claiming to be paid by the respondent and a letter to CMA praying to withdraw CMA F1 they filed on 31st August 2022 at CMA and replace it with CMA F1 they filed on 02nd September 2022. In the said letter, applicants indicated that they have noted that there are irregularities in the CMA F1 they filed on 31st August 2022. Applicants also served all the aforementioned documents to the respondent.

On 19th September 2022 applicants appeared for the first time before Hon. O. Nganika, Mediator, who was acting on behalf of M. Chengula, Mediator, so that the dispute can be mediated. On this date, respondent did not enter appearance. Since respondent did not enter appearance, the dispute was scheduled to 28th September 2022 for mediation. On the later date, applicants appeared before Hon. M. Chengula, arbitrator for mediation, but respondent did not enter appearance. Due to nonappearance of the respondent, the dispute was adjourned to 5th October 2022 for mediation, but respondent did also not appear as a result, it was adjourned to 19th October 2022. Since respondent did not enter appearance on all dates scheduled for

mediation and on 19th October 2022, the 30 days provided for under the law within which mediation can be conducted and concluded elapsed, the arbitrator recorded that mediation has failed. On the same day, namely, 19th October 2022, 1st applicant signed a certificate of non-settlement (CMA F6) before Hon. Chengula, Mediator. On the same date, 1st applicant filed the Notice to refer a dispute to arbitration (CMA F8).

On 31st October 2022, applicants appeared before Hon. Gerald M, arbitrator, for arbitration but respondent did not enter appearance as a result, the dispute was adjourned to 07th December 2022. The dispute was thereafter adjourned to 05th January 2023 and 17th March 2023 also due to non-appearance of the respondent. On 21st April 2023 when both parties appeared, raised the issue of competence of the dispute because she noted that there were two CMA F1 namely the one filed on 31st August 2022 and the one that was filed on 02nd September 2022 and asked the parties to make submissions thereof. Mr. Anthony Kalinga, the Administration and Legal Officer of the respondent, prayed for adjournment as a result, the matter was adjourned to 22nd May 2023.

When the parties appeared before the arbitrator on 22nd May 2023, Mr. Muhindi Saidi, the personal representative of the applicants

responding to the issue raised by the arbitrator, submitted that, applicants noted that CMA F1 that they filed on 31st August 2022, was not properly filled. He went on that, due to that irregularity, on 2nd September 2022, applicants filed a properly filled CMA F1 and wrote a letter to withdraw the CMA F1 they filed on 31st August 2022 and served the respondent.

On the other hand, Mr. Kalinga for the respondent, submitted that CMA F1 that was filed on 2nd September 2022 was filed in violation of the law but did not cite the law violated. In his submissions, Mr. Kalinga did not dispute to have been served with the new CMA F1 and the letter containing the prayer and reasons for withdrawing CMA F1 that applicants filed at CMA on 31st August 2022.

On 11th July 2023, Hon. G.M. Gerald, arbitrator, having heard and considered submissions of the parties, issued a ruling that there is no law allowing applicants to withdraw the said CMA F1 or amend it without making an application. The arbitrator opined further that; the dispute cannot be withdrawn by applicants simply writing a letter before being heard on the application to withdraw the dispute. She added that, applicants were supposed to wait until the dispute is assigned to the mediator and pray to withdraw it or amend the CMA F1. In the final analysis, the arbitrator, relying on the provisions of section 88(10) of the

Employment and Labour Relations Act [Cap. 366 R.E. 2019] dismissed the dispute.

Applicants were aggrieved with the said ruling that dismissed the dispute they filed at CMA hence this application for revision. In their joint affidavit in support of the application, applicants raised two issues to be determined by this court namely: -

1. *whether, it was proper for the arbitrator to raise the issue of competence of CMA F1 while the dispute was pending at CMA for ten (10) months.*
2. *Whether it was proper for the arbitrator to dismiss the dispute,*

When the application was called on for hearing, Mr. Muhindi Said, the personal representative of the applicants, appeared for and on behalf of the applicants while Mr. Anthony Kalinga, the Administration and Legal officer of the respondent, appeared for and on behalf of the respondent.

Before arguing the abovementioned issues, Mr. Said, the personal representative of the applicant, submitted that, on 15th August 2023, applicants served the respondent with the application but the later did not file either the Notice of Opposition or the counter affidavit within fifteen days provided for under Rule 24(4) of the Labour Court Rules, GN. No. 106 of 2007. Due to non-compliance with the Rule 24(4) of GN.

No. 106 of 2007 (supra), the personal representative of the applicants prayed the application be heard exparte.

Mr. Kalinga, the Administration and Legal officer of the respondent confirmed that respondent was dully served and that failed to file either the notice of opposition or the counter affidavit to oppose the application. In fact, Mr. Kalinga had no plausible explanations for failure of the respondent to file either the Notice of Opposition or the counter affidavit. With that confirmation, and due to absence of justifiable reason for failure to file either the Notice of Opposition or the Counter affidavit to oppose the application, I acceded the prayer by the personal representative of the applicant and allowed the application to be heard exparte hence this exparte judgment.

Mr. Said, the personal representative of the applicants opted to submit generally to the aforementioned issues raised by the applicants in their joint affidavit in support of the application. It was submissions of the personal representative that, on 31st August 2022 applicants filed the dispute relating to unfair termination of employment, but on 02nd September 2022 they withdrew the CMA F1 that was not properly filled and filed a proper CMA F1. He submitted further that, at the time of filing a proper CMA F1, applicants were within time because the dispute arose on 6th August 2022 and that, it was not proper for the arbitrator to

dismiss the dispute. He cited the case of ***Shallo Stephen Shallo v. SRS-A Rent Car & Tours Ltd***, Revision No. 970 of 2019, HC (unreported) to support his submissions. He concluded his submissions praying the court to nullify CMA proceedings, quash, and set aside the ruling and order trial *de novo*.

I have examined the CMA record and considered submissions made on behalf of the applicants and find that, it is undisputed that on 31st August 2022 applicants filed CMA F1 complaining that respondent unfairly terminated their employment. In the said CMA F1, applicants indicated that the dispute arose on 06th August 2022. It is also undisputed that the said CMA F1 was not properly filled by the applicants and that on 02nd September 2022, applicants wrote a letter to CMA praying to withdraw CMA F1 they filed on 31st August 2022 and filed a properly filled CMA F1. It is further undisputed that, the said two CMA F1 and the letter written by the applicants praying to withdraw CMA F1 they filed on 31st August 2022 were dully served to the respondent. I should point out at this stage that, since the dispute of fairness of termination arose on 06th August 2022, on 02nd September 2022 applicants were still within 30 days provided for under Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 within which to file the dispute for unfair termination.

I have carefully examined the CMA record and find, as it was correctly submitted by Mr. Saidi, the personal representative of the applicants that, the CMA F1 that was filed on 31st August 2022 by applicants was not properly filled because, applicants did not indicate individual dates of employment and the amount claimed by each. Presumably, because there is no enough space in the CMA F1 for the parties to include all those details. In my view, absence of those details would have caused difficulties during arbitration because the amounts claimed by each applicant was not known. More so, evidence of the parties especially applicants would have not been directly to what they pleaded in the CMA F1. With those observations, I entirely agree with the personal representative of the applicants that the CMA F1 that was filed by the applicants on 31st August 2022 was not properly filled. It was for the foregoing, in my view, applicants, while mindful of the provisions of Rule 5(1), (2) and (3) of GN. No. 64 of 2007 (supra) appointed and mandated the 1st applicant to sign another CMA F1 and attached the said mandate and amount each applicant was claiming from the respondent.

As pointed hereinabove, applicants wrote a letter to CMA praying to withdraw CMA F1 they filed on 31st August 2022. It was the view of both the arbitrator and the respondent that, it was improper for the

applicants to write a letter to withdraw the said CMA F1 even before the parties were called to appear before the mediator, who, in their view, could have guided the applicants either by allowing them to withdraw the dispute or not. The position held by both the arbitrator and the respondent, has to a great length, exercised my mind. In fact, considering occurrence of events and circumstances of the application at hand, it has led me to raise four issues namely, (i) whether the mediator was appointed and assigned to mediate the parties and when was that done, (ii) whether, there is a provision in our labour statutes allowing a party to withdraw the dispute before it is scheduled for mediation, (iii) whether, the arbitrator was appointed and assigned to arbitrate the dispute between the parties and (iv) whether it was proper for the arbitrator to dismiss the dispute.

I will start with the first issue relating to appointment and assignment of the mediator to mediate the parties and the third issue relating to appointment and assignment of the dispute to the arbitrator. Section 86(1) and (3)(a) of Cap. 366 R.E. 2019(supra) is clear that, a person filing the dispute must do so by filing CMA F1 and that, upon filing the said CMA F1, the Commission shall appoint the Mediator to mediate the parties. Therefore, for the mediator to mediate the dispute, he/she must be appointed. Similarly, Section 88(2)(a) and (3)(a) of Cap.

366 R.E 2019(supra) provides that, where the parties fail to resolve the dispute through mediation, the Commission must appoint an arbitrator to decide the dispute. It is also clear that, in order the arbitrator to arbitrate the dispute filed at CMA, he/she must be appointed for that purpose.

After being appointed as Mediator, in order to mediate the parties, the mediator, must be assigned the dispute to mediate. Similarly, after failure of mediation, the dispute must be assigned to the arbitrator. Section 15(1)(b) of the Labour Institutions Act [Cap.300 R.E.2019] is loud and clear to that position. The said section provides: -

"15(1) In the performance of its functions, the Commission may-

(b) ***assign mediators and arbitrators to mediate and arbitrate disputes in accordance with the provisions of any labour law;"***

It is my view that the phrase "assign mediators and arbitrators to mediate and arbitrate disputes" were not inserted by the Legislature for cosmetic purpose. In my view, the intention of the legislature is that mediators and arbitrators must be assigned disputes to mediate or arbitrate. In my view, the said section is intended to maintain transparence and increase confidence of the parties to both mediators and arbitrators by eliminating possibilities of either mediators or arbitrators hijacking disputes to be mediated or arbitrated. The said

subsection intended to eliminate the possibility of the parties to appear before different mediators or arbitrators for the same disputes on different dates. The intention of the parliament was to create certainty in the mind of the parties as to person to whom they will appear for mediation or arbitration on one hand and accountability of mediators and arbitrators on the other hand.

Now, in the application at hand, there is no evidence in the CMA record showing the date the dispute was assigned to Hon. M. Chengula, mediator or that the dispute was assigned to the said mediator to mediate the parties. It is also unknown as to how the file landed in hands of Hon. O. Nganika, mediator, who, on 19th September 2022 indicated that he was recording proceedings on behalf of Hon. M. Chengula, Mediator. In my view, evidence of assignment could have shown whether the mediator did not act timely to handle the matter between the parties or not. That evidence could have helped the court to gauge accountability of the said mediator. Due to absence of that evidence, applicants were punished unnecessarily because had the mediator acted timely at the time applicants were still within time, they could have remedied the situation after filing the new CMA F1 on 2nd September 2022. Not only that but also, the record does not show the

date the dispute was assigned to Hon. G.M. Gerald, arbitrator or that the dispute was assigned to the said arbitrator.

Absence of proof of assignment of the dispute to the mediator and or the arbitrator, creates a room for mediators and or arbitrators to hijack disputes and continue to mediate or arbitrate the parties contrary to the above cited provisions. Considering circumstances of this application, I hold that, it was improper for both the mediator and the arbitrator to handle the dispute between the parties without being assigned. It seems that mediators and arbitrators are given files by their in charges orally so that they can mediate or arbitrate the parties. In my view, that is not proper. As pointed hereinabove, is contrary to the spirit and intention of the parliament in enacting section 15(1)(b) of Cap.300 R.E.2019(supra) cited above and the well-known principle that the government works on papers or by records.

It is my view that, in order to show that there is compliance with Section 15(1)(b) of Cap.300 R.E.2019(supra), in charges must assign the dispute to the mediator to mediate the parties or arbitrators for arbitration and must kept evidence of assignment in the file. Again, if it happens that there is a need of re-assigning the dispute to another mediator or arbitrator, the in charge must sign a re-assignment for showing that the dispute has been transferred from the former mediator

or arbitrator to the other new mediator or arbitrator. As pointed hereinabove, that will increase transparency in administration of justice and avoid chaos or complaint that the matter was hijacked from one mediator or arbitrator to the other. There is a litany of case law to this position. See for example the case of ***Charles Chama & Others vs the Regional Manager TRA & Others***, Civil Appeal No. 224 of 2018 [2019] TZCA 417, ***National Microfinance Bank vs Augustino Wesaka Gidimara T/a Builders, Paints & General Suppliers*** (Civil Application No. 154 of 2015) [2016] TZCA 209, ***M/S Georges Center Limited vs The Honourable Attorney General & Another,*** Civil Appeal No. 29 of 2016 [2016] TZCA 629, ***M/s Flycatcher Safaris Ltd vs. Hon.Minister For Lands & Human Settlements Developments & Another***, Civil Appeal No. 142 of 2017 [2021] TZCA 546, ***Leticia Mwombeki vs Faraja Safarali & Others,*** Civil Appeal No. 133 of 2019 [2022] TZCA 349, ***Hamisi Miraji vs Republic***, Criminal Appeal No. 541 of 2016 [2018] TZCA 237, ***Daniel Mugittu and Another vs Lonagro Tanzania Limited*** (Labour Revision No. 684) [2020] TZHCLD 399, ***Tulipo Mwereke vs Mihan Gas Co.Ltd (now Taifa Gas Tanzania Limited*** (Revs Appl No. 65 of 2022) [2022] TZHCLD 1086 and ***Charles Samwel Koja vs Kobil Tanzania Ltd*** (Revs Appl No. 173 of 2022) [2022] TZHCLD 1100 and ***LSG SKY Chefs vs Badili***

Mgambo (Revision No. 117 of 2023) [2023] TZHCLD 1384 to mention but a few. In ***Miraji case*** (supra), the Court of Appeal quoted its earlier decision in ***Priscus Kimario's case*** (supra) as follows: -

> *"...where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to detriment of justice. This must not be allowed".*

In ***M/S Georges Center's case*** (supra) the Court of Appeal having considered the provisions of Oder XVIII rule 10 of the Civil Procedure Code [Cap. 33 R.E. 2019] held: -

> *" The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason, he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law.* ***Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised****".*

It is high time now for the Commissioner for CMA to design a mechanism or a form that will require all in charges to assign disputes to

mediators and arbitrators showing the date of assignment and evidence of assignment be kept in the file. Again, as pointed hereinabove, if it happens that there is a need to re-assign the dispute, then, the in charge must do so through re-assignment form and evidence of re-assignment also be kept in the file.

Now, turning to the second issue namely, whether there is a provision allowing a party to withdraw the dispute before it is scheduled for mediation or at arbitration stage, or allowing the party to amend the CMA F1 at mediation or arbitration stage. I have read the provisions of Cap. 366 R.E. 2019 (supra) and the Employment and Labour Institutions (General) Regulations, No. 47 of 2017 that is made under the said Act and find that there is no any provision allowing a party to amend or withdraw the CMA F1. I have read the provisions of Cap. 300 R.E. 2019(supra), Labour Institutions (General) Regulations, No. 45 of 2017, Labour Institutions (ethics and Code of Conduct for Mediators and Arbitrators) Rules, GN. No. 66 of 2007, Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007 and the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 and managed not to come across with a provision allowing a party to amend or withdraw the CMA F1 whether, at mediation stage or arbitration stage. I have read the provisions of section 86(1) and 88(10) of Cap.

366 R.E. 2019 (supra) and Rule 12 of GN. No. 64 of 2007 (supra) relied upon by the arbitrator in her ruling and find that those provisions are not relevant. It is my view that, there is a lacuna in the law that, there is a need to fix that lacuna. In my view, the law should be clear on that aspect. I therefore advise the responsible authority to consider and make necessary amendments.

It was submitted on behalf of the applicants that applicants filed CMA F1 on 31st August 2022 but noted that it was not properly filled as a result, on 02nd September 2022 filed a new CMA F1 that was properly filled. I have examined CMA record and find that applicants served the said CMA F1 to the respondent on 03rd September 2022. The record shows further that, on 2nd September 2022 applicants filed a letter to the Commission and the respondent praying to withdraw the CMA F1 they filed on 31st August 2022. As pointed hereinabove, there is no evidence as to when the dispute landed in hands of Hon. O. Nganika, arbitrator, who, on 19th September 2022 recorded proceedings on behalf of Hon. M. Chengula, Mediator. I should point out that, on 19th September 2022, the period of 30 days available for the applicants to file a new dispute relating to termination had already expired. In my view, had the dispute been assigned to the mediator and upon the assigned mediator reading the two CMA F1 and the letter by the

applicants seeking to withdraw the former CMA F1, the mediator could have issued the order to that effect or could have called the parties and ask them to submit before they are caught by limitation of time.

The CMA record shows that on 28th September 2022 when applicants appeared for the first time before Hon. Chengula, Mediator, both CMA F1 filed on 31st August 2022 and 02nd September and the letter filed on 02nd September 2022 withdrawing the CMA F1 filed on 31st August 2022 were in the same file. I have read the certificate of non-settlement (CMA F6) that was signed by Chacha Ryoba, 1st applicant and Hon. Chengula, Mediator on 19th October 2022 and find that it shows *inter-alia* that: -

> "APPLICANT'S NAME: CHACHA RYOBA SERONGA NA WENZAKE 2
> RESPONDENT'S NAME: SGA SECURITY TANZANIA LIMITED
> LABOUR DISPUTE NUMBER: CMA/DSM/KIN/482/2022
> DATE OF REFERRAL OF DISPUTE TO THE CMA: 02/09/2022
> NATURE OF DISPUTE: TERMINATION OF EMPLOYMENT
> …"

The above quoted part of CMA F6 clearly shows that, the mediator only considered CMA F1 that was filed by the applicants on 02nd September 2022. In my view, the mediator was aware that applicants withdrew CMA F1 they filed on 31st August 2022. In other words, the dispute that was brought to the attention of the mediator and mediation

failed, is the one that was filed on 02nd September 2022. In fact, the dispute that was filed on 02nd September 2022 through the CMA F1 that was filed on that date was assigned No. CMA/DSM/KIN/482/2022 while the CMA F1 that was filed on 31st August 2022 was not assigned any number. That means that the dispute that was before CMA is the one filed on 02nd September 2022 and not 31st August 2022. The arbitrator therefore erred to dismiss the dispute on ground that there were two CMA F1 while the CMA F1 filed on 31st August 2022 was not assigned dispute number. In other words, the arbitrator dismissed the dispute that was filed on 02nd September 2022 based on the dispute that did not exists.

It is my view that, facing the reality as pointed hereinabove that there is no provision that a party can use to move the mediator or the arbitrator either to withdraw or amend CMA F1, Hon. Chengula, mediator, found the letter filed by the applicants of 02nd September 2022 withdrawing CMA F1 they filed on 31st August 2022 to be a sufficient notice of withdrawal. It was wrong in my view, for the arbitrator only to choose CMA F1 that was filed on 31st August 2022 that did not go through mediation stage and that was not assigned dispute number and leave aside the CMA F1 that was filed on 02nd September

2022 which also passed through mediation stage. Had the mediator considered that mediation is mandatory and that, CMA F1 applicants filed on 31st August 2022 did not go through mediation stage, she could have found that the said letter by the applicants sufficiently withdrew CMA F1 that was filed on 31st August 2022. More so, requiring applicants to maintain the CMA F1 that was filed on 31st August 2022, technically, was forcing them to be caught by limitation of time and technicalities of filing an application for condonation.

From what I have discussed hereinabove, I hold that the arbitrator erred to dismiss the dispute filed by the applicants before hearing evidence of the parties. If arbitrator was of the view that the dispute was improperly filed due to presence of two CMA F1, then, she was supposed to struck out the dispute and not to dismiss it. The dismissal order did not give chance to the applicants to file another dispute subject to limitation of time. But, from what I have discussed hereinabove, the arbitrator was neither supposed to dismiss the dispute nor strike it out because, the dispute in the CMA F1 that passed through mediation stage and assigned dispute number was filed on 02nd September 2022.

For all what I have discussed hereinabove, I allow the application, quash, and set aside the CMA ruling and order the parties to go back to

CMA so that the dispute can be heard by a different arbitrator without delay.

Dated at Dar es Salaam on this 06th October, 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 06th October 2023 in chambers in the presence of Muhindi Saidi, Personal Representative of the Applicants but in the absence of the Respondent.

B. E. K. Mganga
JUDGE