THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LABOUR DIVISION]

AT ARUSHA

LABOUR REVISION No. 107 OF 2020

(Originating from Employment Dispute No. CMA/ARS/ARB/117/2020)

KENYA KAZI SECUIRTY (T) LIMITED.....APPLICANT

VERSUS

PASCHAL QANNE MICHAEL..... RESPONDENT

JUDGMENT

16th June & 28th July, 2022

TIGANGA, J.

This is the revision against the award of the Commission for Mediation and Arbitration at Arusha (Mwebuga, O, Arbitrator) herein referred to as "the CMA" in Employment Dispute No. CMA/ARS/ARB/117/2020. The background giving rise to the revision will shortly be apparent. Suffice it to say that, the respondent instituted the employment dispute against the applicant company over dissatisfaction of his alleged premature and unfair termination.

The applicant and the respondent were employer and employee respectively, having entered into employment contract on 18th March, 2013, in which the respondent was employed as a security guard. As the applicant's name self-suggesting, she is a company registered in

Tanzania ensuring and performing security services. As earlier on pointed out, gathering from the record, the respondent was employed on 18th March, 2013. This is according to exhibit D1 tendered and admitted before the CMA. On 07th August, 2019, via a letter written by the applicant, the respondent was terminated allegedly for the reasons of gross misconduct.

The respondent was aggrieved by the decision. In his view, it was substantively and procedurally incorrect. He believed the termination to be manipulated in order to do away with his daily bread. Therefore, in the event, he referred the matter to the CMA seeking some legal redress.

Before the CMA, as a matter of law and procedure, mediation was conducted in vain. That was followed by arbitration. For reasons best known by the applicant, because they had never been endorsed otherwise by a legally convened tribunal and or court, the applicant did not appear before the CMA. Following such absence but, within the percept of the law, the Arbitrator ordered the dispute to be heard exparte. At the hearing, the respondent was called upon to state his complaint before the CMA which he did. Then, the matter was closed and the date for pronouncement of the award exparte was scheduled.

Relying on exparte proof, on 13th November, 2020, the Arbitrator pronounced an exparte award in favour of the respondent. On 15th December, 2020, the applicant came to this Court and filed this revision.

In the applicant's notice of application supported by the chamber summons and affidavit sworn by Elias Mgonja, a principal officer of the applicant company, this Court was moved to grant the following reliefs:

i. That this honourable Court be pleased to revise and set aside the award of CMA dated 13th November, 2020 in the above mentioned employment dispute.

ii. This court to give any other order(s) this Court deems fit and just to grant.

The grounds for revision as put forth in the affidavit sworn and filed in support of the application, advance the complaint that, the Honourable Arbitrator erred in law and facts for reaching to an exparte hearing order without a proper proof of summons. However, for reasons to be shortly revealed in this judgment, I will put much emphasis on discussing this ground because the remaining grounds, their survival at this evaluation juncture, depends much on the stability and sustainability of that one.

Noteworthy, the respondent in his counter affidavit specifically at paragraph 6(iv) was quick to dispute the fact deponed by Mr. Mgonja in lengthy by deposing that, the lamented exparte proof was proper and legally justifiable. The details of the facts disputing the application will for the sake of brevity, not be reproduced here, but will be referred to whenever need arises.

Gathering from the facts on record, in my view, the issue for determination at this point is one namely whether this revision has been maturely filed before this Court? While raising this issue for determination, I am quite alive that the issue was neither raised in the affidavit by the applicant's side nor by the respondent in his counter affidavit. These affidavits perform the same functions in this revision like those of pleadings in normal civil cases.

Thus, it could not be wrong terming them pleadings for them being the motion documents, they perform similar function like the pleading in normal civil suit. That being so, I am aware of the principle that, parties are bound by their own pleadings. This principle is in plethora of case laws some of which are **Peter Ng'homamgo vs The Attorney General**, Civil Appeal No. 114 of 2011 and **Juma Jaffer**

Juma vs Manager, PBZ Ltd & 2 Others, Civil Appeal No. 7 of 2002 (Both of the Court of Appeal of Tanzania and unreported).

Leaving apart the above principle, I am also minded on another guiding rule that, the issue of jurisdiction may be raised at any stage of the proceedings save that, parties must be accorded an opportunity of being heard and addressing on the essence and or otherwise of the issue raised tantamount to merit the case. Also, in this area authorities are legion. See the cases of **Yazidi Kassim t/a Yazidi Auto Repairs vs Hon. Attorney General**, Civil Application No. 354 of 2019 and **Kwabwandumi Ndefaoo Ndossi vs Mtei Bus Service Limited**, Civil Appeal No. 257 of 2018 (Both of the Court of Appeal of Tanzania unreported).

In this revision the applicant was represented by Mr. Fidel Peter while the respondent appeared in person after his personal representative has been disqualified by the order of this court on account of conflict of interest. That order was followed by him being given a chance to find another representative but he decided to fend for himself.

In his submission in chief, Mr. Fidel Peter argued that at CMA during arbitration they were told that, they would be called by the

summons to appear and defend the dispute against them. That, by then there was a problem in service of summons and therefrom the Arbitrator made an order for hearing exparte. Also, that, there were shortcomings in the whole process of serving summons.

On his part, the respondent who appeared in person, unrepresented, contended that, the award was properly given basing on the requirement of section 83(3)(b) of the Employment and Labour Relations Act [Cap. 366 R. E 2019]. That, since the applicant did not attend at the CMA in accordance with the PMQ1 and PMQ2 and she did not bother to take any action even after being informed of the exparte award, she deserves nothing in this revision.

The respondent on the same issue, intimated that, the applicant had a chance to go back to CMA to apply for setting aside the award issued by CMA in accordance to section 87(5)(b) of the said Employment and Labour Relations Act, but did not do that. In his view, this application was prematurely filed before this court.

In rejoinder, the learned Advocate summarily dismissed the contention by the respondent that the raised issues were not pleaded in the counter affidavit. He reiterated his position in submission in chief.

As said above, despite the fact that, the issue of setting aside first the award in the CMA was not raised in the affidavits by parties, it was raised in oral submission by the respondent which was summarily dismissed by Mr. Fidel Peter. If that is the case, no one can be heard saying that it was not raised and parties were not given a chance to submit on it. Going by the principle that, the issue of jurisdiction can be raised at any stage of proceedings including during hearing of revision even though, it was not raised as a preliminary point of law.

This is based on the firm principle which is part of our jurisprudence that all courts are only able to entertain cases which they have jurisdiction to entertain. By that analogy, even this court can only entertain revision application where it has jurisdiction to do so. The court entertaining the matter without jurisdiction is as good as fetching in holed bucket, water cannot be held.

The contention is based on the argument that since the matter before the CMA was heard exparte then the aggrieved party whose matter was heard in exclusion, is required to first file the application to set aside an exparte award before he is entitled to file revision application to challenge the award passed exparte. This issue is not

virgin in our jurisdiction, it has already been dealt with by the court by this court and the court of appeal the decision which I will be guided by.

In the case of **Tanzania Agricultural Workers Union v. Gadiel Nyindo,** Lab Div., DSM, Revision No. 136 of 2012, 2/8/13. Reported in the High Court Labour Digest of 2015 my senior sister Wambura, J. once confronted with an issue similar to this one, she stated as hereunder:

> *"It is a legal requirement that where an arbitration award has been procured ex parte, the proper action to be taken by the party who wants to be heard is first to apply to the same body to have it set aside, in this matter it is CMA".*

Also, my senior learned sister Nyerere, J. on the same matter in the case of **DAWASCO v. Wilson Mchumbe Chacha,** Lab. Div., DSM, Revision No. 183 of 2014, 23/09/15 (also reported in the High Court Labour Digest of 2015) had the following observations;

> *"My consideration and understanding of the law is that an exparte award can only be revised after a party aggrieved by the exparte award made an application before the same Court or Registrar as the case may be and adducing sufficient reasons as to why the exparte award be set aside, if the Court/Registrar failed to set aside the exparte award*

for any reasons, an aggrieved party may appeal or seek revision against such decision. Therefore, I join hand with respondent's counsel that this application is pre-maturely filed in this court."

With the provision of 87(5)(b) of the Employment and Labour Relations Act, [Cap. 366 R.E 2019] and persuaded by the two cases referred above which I find to be the correct position of the law that, once the case has been heard and determined exparte, the person against whom the case was so heard, must, as a matter of law, first, file an application to set aside the award or decision passed exparte, before he is entitled to challenge the exparte award or decision to the higher court. The reason for this is very obvious, that challenging the merit of the award or decision can be done by the person whose evidence is also on record to assist the court or tribunal to weigh the two sets of evidence and come up with a conclusion that, as between the two sets of evidence which one is heavier. That said, in this case, the applicant was supposed to first file the application to set aside the exparte award before the CMA which passed the exparte award.

It is unfortunately that, the applicant did not do that, instead she filed this application, thus making suffer be prematurity. From the above authorities, it is mandatory that that the who was not heard before the

trial court that he must file the application to set aside the exparte award before he appeal or file the revision challenging the substantive part of the decision. Non compliance with this mandatory procedure of setting aside the award before CMA, takes away the jurisdiction of this court to entertain the revision.

That said, I find the application for revision to be prematurely filed by the applicant as he was supposed to exhaust the available remedies which he has not exhausted, the same is therefore bound to fail for being incompetent before this court.

All said and done, I hereby struck out this revision for being incompetently filed. Since this is a labour matter, I order no costs. As this ground suffices to dispose of the revision, I find no need to deal with the rest of the grounds.

It is accordingly ordered.

DATED at **ARUSHA** on this 28th day of July 2022.

J.C. TIGANGA

JUDGE.