

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 170 OF 2020

BETWEEN

INFINITE STATE (T) LTD.....APPLICANT

AND

JONAS MUGISHA KATUNZI.....1ST RESPONDENT

MOHAMED HUSSEIN MAKUNDI.....2ND RESPONDENT

MOHAMED HAMIS DIBUNDILE.....3RD RESPONDENT

SHABANI MASOUD HUSSEIN.....4TH RESPONDENT

JUDGMENT

Date of the Last Order: 15/04/2021

Date of the Judgment: 11/06/2021

A. E. Mwipopo, J.

INFINITE ESTATE (T) LTD, the Applicant herein, filed the present application for revision against the *ex parte* arbitral award and the ruling of the Commission for Mediation and Arbitration (herein referred as CMA) in Labour Dispute No. CMA/DSM/KIN/R.550/18. The Applicant is praying for the Court to revise and quash arbitration proceedings and ruling issued by Hon. P.M. Chuwa, Arbitrator, in the respective Labour Dispute. The application is supported by the sworn affidavit of Mohamed Sarfaraz Tejan who is Applicants' Principal Officer. The affidavit contains 3 legal issues that arises from material facts in paragraph 4. The respective legal issues are as follows:-

1. Whether, the Arbitrator erred in law and facts for considering that the copy of *ex parte* award was properly served to the Applicant herein without proof of service.
2. Whether the Arbitrator erred in law and facts for determining the application without receiving a copy of application and proceeded without knowing when the application was filed.
3. Whether, the Arbitrator erred in law and facts for not taking into account the reasons for non-appearance for the counsel for the Applicant on 23rd day of October, 2018.

The historical background of the dispute is that; the Applicant on 7th May, 2018 terminated the employment of his employees namely Jones Mugisha Katunzi, Mohamed Hussein Makundi, Mohamed Hussein Kibundile and Shabani Masoud Hussein, who are the Respondents herein. The Respondents referred the dispute to the Commission which delivered its decision in their favour an *ex parte* arbitral award on 7th June, 2019. The Applicant was served with the *ex parte* arbitral Award on 13th June, 2019 through CUM City Agent Mail from Tanzania Postal Corporation. The Applicant was not satisfied with the Commission *ex parte* award and decided to file the application to set aside the *ex parte* Award before the Commission on 28th June, 2019. The Commission delivered its ruling on 30th March, 2020, where the application was struck out

for being filed out of time. Dissatisfied by the Commission Ruling, the Applicant filed the present revision application.

When the matter came for hearing, both parties were represented. The Applicant was represented by Mr. Hemed Omari, Personal Representative, whereas the Respondents were represented by Mr. Joseph Basheka and Mr. Kenneth Mwangoka, Personal Representatives.

The Personal Representative for the Applicant submitted all grounds of revision together. In summary, he averred that the Arbitrator erred in his ruling dated 30th March, 2020 for relying on rule 30(1) of the G.N. No. 64 of 2007 which provides that the application to set aside or to correct the award has to be filed within 14 days from the date of receiving the decision of the Commission which is subject of the application.

He submitted further that the Commission *ex parte* award was heard in *ex parte* following the failure of the Applicant to appear before the Commission on 23rd October, 2018. Advocate Hussein Hitu who was representing the Applicant before the Commission was appearing before the High Court Land Division. The Counsel did write a letter on 22nd October, 2018 to inform the Commission that he will be absent on 23rd October, 2018 and requested the Commission to adjourn the matter to another date. The Counsel attached a copy of the summons of the High Court Land Division in the respective letter.

Since the High Court is superior to the Commission, the Arbitrator was supposed to adjourn the matter to another hearing date.

He cited the Indian case of **Smt. Preetam Kaur V. Nagar Palika Parishad Pithaura, M.A No. 1002/2006, Court of Chhattisgarh Bilaspur**, where it was heard that the obligation of the party is to select his advocate, brief him, pay the fees and trust the learned Advocate to do the rest of the things. It is the duty of the advocate to attend the proceedings. The party having done everything in his power to effectively participate in the proceedings can rest assured of what is happening in the Court with regard to his case nor he has to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is not part of his job. The Court re enrolled the matter and ordered for the same to be heard by subordinate Court. He is of the opinion that the Applicant had sufficient ground for his non - appearance.

He also cited the case of **Palm Beach Casino V. Theresia Martin, Miscellaneous Application No. 54 of 2019, High Court, Labour Division, at Dar Es Salaam, (Unreported)**, where this Court held that right to be heard is fundamental right which it will be infringed when the party is not heard before being condemned.

In contention, the Respondents' Personal Representative namely Joeseph Basheka submitted that the Applicant's application to set aside Commission

ex parte award was struck out following the Respondents' preliminary objection that the application was filed out of time. Rule 30(1) of G.N. No. 64 of 2007 provides for time limitation of filing the respective application. Briefly, he submitted that the Arbitrator was right to strike out the application. The Applicant was served with the Commission *ex parte* award on 13th June, 2019, thus he was supposed to file his application to set aside the Commission *ex parte* award within 14 days. He stated that the Applicant alleged to have received the Commission award on 28th June, 2019, but in paragraph 3.11 of his affidavit the Applicant stated that he received the Commission *ex parte* award on 27th July, 2019. However, Applicant's application to set aside *ex parte* award was filed before the Commission on 8th July, 2019. The Personal Representative for the Respondents prayed for the Court to dismiss the revision for want of merits.

In rejoinder, the Applicant's Personal Representative retaliated his submission in chief.

From submissions, the issue for determination in this application is whether the Applicant have sufficient cause for the Court to grant his application to set aside the Commission *ex parte* award.

It is a principle of law that an application to set aside an *ex parte* award is granted where the Applicant establish sufficient ground for the Commission or the Court to set aside the ex parte decision. In the case of **Mbeki Teachers**

Sacco's V. Zahra Justas Mango, Revision No. 164 of 2010, High Court Labour, Division at Mbeya, (Unreported), this Court held that sufficient reason is pre – condition for Court to set aside *ex parte* order.

The Commission's *ex parte* Award is set aside if the Court or Commission is satisfied that the party was prevented from appearing by sufficient cause. This Court in the case **M/S Jaffer Academy V. Hhawu Migire**, Revision No. 71 of 2010, High Court Labour Division, at Arusha, (Unreported), held that:

"When a party aggrieved by an ex parte award on ground that the order to proceed ex parte was wrongly made, the proper procedure open to the aggrieved party is to apply to the CMA, explaining reasons for the failure to appear before it, and seeking its order to set aside the ex parte award. If the Commission is satisfied that such a party had a good ground for failing to attend hearing, it will reverse the ex parte order so made and allow the matter to proceed interparty".

In the present application, the Arbitrator did strike out application filed by the Applicant to set aside Commission *ex parte* award following preliminary objection raised by the Respondents that the application was time barred. The Applicant is of the opinion that the Arbitrator erred to rely on rule 30(1) of G.N. No. 64 of 2007 to strike out the application. In contention, the Respondents submitted that the Applicant filed his application to set aside Commission *ex parte* award out of time provided by rule 30(1) of G.N. No. 64 of 2007 as a result the application was struck out for being time barred.

Rule 30(1) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 provides for 14 days' time limitation for filing an application to correct or set aside an arbitration award. The rule reads as follows, I quote:-

"30.-(1) An application by a party to correct or set aside an arbitration award in terms of section 90 of the Employment and Labour Relations Act shall be made within fourteen days from the date on which the applicant became aware of the arbitration award."

The evidence in record shows that the Commission award was delivered on 7th June, 2019 and the copy of the same was served to the Applicant on 13th June, 2019 through CUM City Agent Mail from Tanzania Postal Corporation. The Applicant averred that he received the copy of the respective award on 20th June, 2019 and filed the application to set aside the Commission *ex parte* award on 28th June, 2019. However, there is no evidence whatsoever which shows that the Applicant received the copy of the award on 20th June, 2019 as he alleged. But, there is evidence which shows that the copy of the award was delivered to the Applicant through Postal Services on 13th June, 2019. And as it was rightly held by the Arbitrator, the Applicant was supposed to file the application within 14 days from the date he became aware of the arbitration award as it is provided by rule 30(1) of G.N. No. 64 of 2007. Thus, I find that the Applicant filed application for revision out of time prescribed by the law and the Commission was right to strike out the application for being time barred.

Since the application to set aside Commission *ex parte* award was struck out for being time barred, it means that the matter was not heard on merits. This is to say that the Commission did not determine the respective application to set aside Commission *ex parte* award on merits. As a result, I am not going to determine the Applicant submission on his reason for non-appearance on the hearing date.

Therefore, I find the revision application to have no merits and I hereby dismiss it. Each party to take care of its own cost of the suit.



A. E. MWIPOPO
JUDGE
11/06/2021