

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

REVISION APPLICATION NO. 434 OF 2022

*(Arising from a Ruling issued on 17/5/2022 by Hon. Mikidadi, A, Arbitrator in Labour dispute No. CMA/
DSM/ TEM/720/2018 at Temeke)*

BOARD OF DIRECTORS CENTRE FOR FOREIGN RELATIONS APPLICANT

VERSUS

HASSAN ALLY HASSAN RESPONDENT

JUDGMENT

Date of last Order: 28/03/2023
Date of Judgment: 09/5/2023

B. E. K. Mganga, J.

Brief facts of this application are that, on 1st December 2014, the Board of Directors Centre for Foreign Relations, the herein applicant, employed Hassan Ally Hassan, the herein respondent, for unspecified period. It happened that on 20th March 2018, applicant terminated employment of the respondent, allegedly, due to misconducts. Aggrieved with termination, respondent filed Labour dispute No. CMA/DSM/TEM/720/2018 before the Commission for Mediation and Arbitration(CMA) complaining that applicant terminated his employment unfairly. On 15th March 2019, Hon. G. Simba, Mediator, issued an ex-parte

award in favour of the respondent. In the said ex-parte award, the Mediator, ordered applicant to reinstate the respondent and pay him TZS 9,000,000/=.

Applicant was aggrieved with the said ex-parte award. Being out of time, applicant filed an application to set aside the said ex-parte award. On 17th May 2022, Hon. Mikidadi, A, Arbitrator, issued a ruling dismissing application by the applicant that CMA has no jurisdiction to entertain the dispute between the applicant and the respondent because the latter was a Public Servant.

Further aggrieved, applicant filed this application for revision. To support the Notice of Application, applicant filed the affidavit sworn by Georgina Kinabo who raised four (4) grounds namely :-

- 1. That CMA had no jurisdiction to determine the dispute between the parties.*
- 2. That the arbitrator erred to dismiss the application by the applicant without affording the parties right to be heard.*
- 3. That the arbitrator erred to order the dispute to be heard ex-part without proof of service to the applicant.*
- 4. That, according to the Diplomatic and Consular Immunities and Privileges Act, Cap. 356 R.E. 2002, applicant has diplomatic immunity.*

In resisting the application, respondent filed his counter affidavit.

When the application was called on for hearing, Ms. Adelaida Ernest, and Georgina Kinabo, both State Attorneys, appeared and argued for and

on behalf of the applicant while Ms. Beatrice Godfrey, Advocate appeared and argued for and on behalf of the respondent.

Arguing in support of the 1st and 4th grounds, Ms. Ernest submitted that, Respondent was a Public Servant employed for unspecified period of contract. She went on that; employment of the Respondent was terminated on 20th March 2018. Learned State Attorney cited Section 32A of the Public Service Act [Cap. 298 R.E. 2019] and submit that Respondent was supposed to exhaust remedies provided for under the said Act prior filing the dispute at CMA. Counsel for the applicant cited the case of ***Tanzania Postal Corporation v. Dominic A. Kalangi***, Civil Appeal No. 158 of 2020 CAT (unreported) to support her submissions that CMA has no jurisdiction over Public Servants.

Ms. Ernest further submitted that, according to the 4th Schedule to the Diplomatic and Consular Immunities and Privileges Act [Cap. 356 R.E. 2002], CMA has no jurisdiction because applicant has diplomatic immunity. She went on that, prior to filing the dispute against the applicant, respondent was supposed to file a complaint before the Minister for Foreign Affairs through the constitution establishing the applicant between Tanzania and Mozambique.

Arguing the 2nd ground, the learned State Attorney submitted that, the arbitrator erred to dismiss the application filed by the applicant to set aside an ex-parte award. She argued that the arbitrator did not afford applicant right to be heard before dismissing the said application.

Arguing in support of the 3rd ground, Ms. Ernest submitted that, applicant was not served with summons to attend hearing or notification of the date of the award. She strongly submitted that, there was no proof of service of summons to the applicant. In her submissions, learned State Attorney cited the case of ***Cosmas Construction Ltd v. Arrow Garments Ltd*** [1992] TLR 127 to support her submissions that a party who a case has been proved ex-parte is entitled to be notified the date of judgment so that s/he can take necessary steps. She went on that; applicant became aware only after being served with execution application filed by the respondent.

The learned State Attorney submitted further that; the ex-parte award was issued by the Mediator, who, has no jurisdiction. She cited the case of ***Barclays Bank (T) Ltd V. Ayyam Matessa***, Civil Appeal No. 481 of 2020, CAT (unreported) to support her submissions. She further cited Rule 8 of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007 and submit that the said Rule does not give

power to the mediator to conduct arbitration. She added that, in the application at hand, Mediation and Arbitration were conducted by the same mediator. Learned State Attorney, concluded her submissions praying the application be allowed.

Resisting the application, Ms. Godfrey learned counsel for the respondent, opted to submit generally to the grounds raised by the applicant. Responding to submissions relating to jurisdiction of CMA, learned counsel for the respondent submitted that, CMA had jurisdiction because the constitution of the applicant allows applicant to sue and be sued. During submissions, counsel for the respondent conceded that, under the 4th schedule of the Diplomatic Act, applicant is immune. She further conceded that, respondent was a Public Servant and that in terms of Section 32A of the Public Service Act[Cap. 298 R.E. 2019], CMA had no jurisdiction.

Counsel for the respondent concurred with submissions by counsel for the applicant that the application by the applicant was dismissed without affording applicant right to be heard. She was quick to submit that, that was so because the arbitrator had no jurisdiction.

On the complaint that applicant was not served, counsel for the respondent submitted that applicant was served but did not enter

appearance. She clarified that applicant was served on 14th January 2018, 07th December 2018 and 09th January 2019. She added that, the order requiring the respondent to prove the dispute ex-parte was issued on 14th January 2019. When probed by the court, counsel for the respondent conceded that respondent did not give evidence on oath. Counsel for the respondent concluded her submissions praying that the application be dismissed.

In rejoinder, Ms. Kinabo, learned State Attorney reiterated their submissions in chief and maintained that applicant was not served specifically on the date of ex-parte hearing and date of issuing the ex-parte award. She concurred with submissions by counsel for the respondent that evidence of the respondent was recorded not under oath. She therefore prayed that the application be allowed.

I have read evidence in the CMA record and considered submissions made on behalf of the parties in this application and wish, in disposing this application, to start with the 2nd ground. As pointed hereinabove, on 15th March 2019, Hon. G. Simba, Mediator, issued an ex-parte award in favour of the respondent. Applicant was aggrieved with ex-parte award and filed an application to set aside the said ex-parte award. The CMA record shows that, on 17th May 2022, when the parties appeared before Hon. Mikidadi,

A, Arbitrator, for hearing, without affording the parties right to be heard, the arbitrator just issued an order dismissing the application by the applicant on ground that CMA had no jurisdiction. It is clear from submissions of both parties that, parties were not heard. Therefore, the order dismissing the application by the applicant was issued in violation of the principles of natural justice hence cannot stand. The arbitrator was supposed to ask the parties to address him on the merit of the application that was before him and whether CMA had jurisdiction or not. The effect of dismissal of the applicant's application to set aside ex-parte award on ground that CMA has no jurisdiction over a Public Servant has left intact the ex-parte award that was issued by the same CMA. It is my view that the said Ruling dismissing applicant's application to set aside ex-parte award has full of legal problems. In my view, if CMA had no jurisdiction to set aside the ex-parte award involving a Public Servant, then, even the Mediator at the same CMA who issued an ex-parte award that applicant was seeking to set aside had no jurisdiction. Dismissal of the applicant's application left the respondent in possession of the ex-parte award that can be enforced as if it was issued properly. Whatever the case, as it was correctly submitted by the parties that they were not afforded right to be heard by the arbitrator before dismissal of the application to set aside ex-

parte award, the dismissal order cannot stand. It has been held several times by this court and the Court of Appeal that, any decision arrived at in violation of right to be heard, cannot be left to stand even if the same decision would have been arrived at without violation of that right. See for example the case of ***Abbas Sherally & Another vs Abdul S. H. M. Fazalboy***, Civil Application No. 33 of 2002, [*Danny Shasha vs Samson Masoro & Others*](#) (Civil Appeal 298 of 2020) [2021] TZCA 653, [*Margwe error & Others vs Moshi Bahalulu*](#) (Civil Appeal 111 of 2014) [2015] TZCA 282, [*Tabu Ramadhani Mattaka vs Fauzia Haruni Saidi Mgaya*](#) (Civil Appeal 456 of 2020) [2022] TZCA 84, [*Alpitour World Hotels & Resorts S.P.A. & Others vs Kiwengwa Ltd*](#) (Civil Application 3 of 2012) [2012] TZCA 138, [*North Mara Gold Mine Limited vs Isaac Sultan*](#) (Civil Appeal 458 of 2020) [2021] TZCA 755 and [*MANTRAC Tanzania Limited vs Raymond Costa*](#) (Civil Appeal 90 of 2018) [2022] TZCA 75 to mention but a few. In the cited cases, the Court of Appeal cited and quoted its earlier decision in the ***Fazalboy case*** (supra) that:-

"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

The quoted decision of the Court of Appeal has nailed it all.

It was submitted on behalf of the applicant that; CMA had no jurisdiction to determine the dispute between the parties because respondent was a Public Servant and that he did not exhaust remedies provided for under the Public Service Act [Cap 298 R.E. 2019]. In other words, according to submissions of the applicant, CMA had no jurisdiction to issue the said ex-parte award. It was not contested by counsel for the respondent that respondent was a Public Servant and that he did not comply with the provisions of section 32A of Cap. 298 R.E. 2019(supra) that is to say, he did not exhaust remedies provided for under the said Act. I agree with both counsel that, any Public Servant, prior filing a dispute at CMA, is supposed to exhaust all remedies provided for under Cap. 298 R.E. 2019(supra) as it was held by the Court of Appeal in the case of [Tanzania Posts Corporations vs Dominc A. Kalangi](#) (Civil Appeal 12 of 2022) [2022] TZCA 154. Therefore, CMA had no jurisdiction to issue the said ex-parte award in favour of the respondent.

The jurisdiction of CMA was further challenged based on the 4th Schedule to the Diplomatic and Consular Immunities and Privileges Act [Cap. 356 R.E. 2002]. It was submitted on behalf of the applicant and conceded by counsel for the respondent that, applicant has diplomatic

immunity. I entirely agree with their submissions because Cap. 356 R.E. 2002 (supra) is clear on that position. I therefore allow that ground.

I have examined the CMA record and find that on 28th January 2019 respondent gave evidence not on oath. It was correctly submitted by the parties that evidence of the respondent was not recorded under oath. It is true that arbitrators have power in terms of section 20(1)(c) of the Labour Institutions Act [Cap. 300 R.E. 2019] and Rule 19(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007, to administer oath or affirmation to person called as a witness. The requirement of administering oath or affirmation is mandatory under the provisions of section 4(a) of the Oaths and Statutory Declaration Act [Cap. 34 R.E 2019] and Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007. In compliance with that mandatory provision, before a witness testifies, must take oath or affirmation. In the application at hand, evidence of the respondent was not recorded under oath or affirmation. This omission vitiated the whole CMA proceedings. There is a litany of case laws to that position. See the case of [Gabriel Boniface Nkakatisi vs. The Board of Trustees of the National Social Security Fund \(NSSF\)](#) (Civil Appeal 237 of 2021) [2022] TZCA 246 -Tanzlii, [National Microfinance Bank PLC vs. Alice](#)

Mwamsojo, (Civil Appeal No. 235 of 2021)[2022] TZCA 234 -Tanzlii, **Attu J. Myna v. CFAO Motors Tanzania Limited**, (Civil Appeal No. 269 of 2021)[2022]TZCA 187-Tanzlii, **Unilever Tea Tanzania Limited v. Godfrey Oyema**, (Civil Appeal No. 416 of 2020)[2022]TZCA 151-Tanzlii, **The Copycat Tanzania Limited v. Mariam Chamba**, (Civil Appeal No. 404 of 2020)[2022] TZCA 107 -Tanzlii, **North Mara Gold mine Limited v. Khalid Abdallah Salum**, (Civil Appeal No. 463 of 2020)[2022] TZCA 1-Tanzlii, **Unilever Tea Tanzania Limited v. David John**, (Civil Appeal No. 413 of 2020)[2021] TZCA 547 Tanzlii, **Barclays Bank Tanzania Limited v. Sharaf Shipping Agency (T) Limited and another**, (Consolidated Civil Appeal No. 117/16 of 2018 and 199 of 2019)[2022] TZCA 380 Tanzlii, **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, (Civil Appeal No. 257 of 2020)[2020] TZCA 1890 Tanzlii to mention just a few. In **CFAO's case** (supra), the Court of Appeal held: -

" It is now clear that the law makes it mandatory for witnesses giving evidence in court to do so under oath. It follows therefore that the omission by the witnesses to take oath before giving evidence in this case is fatal and it vitiates the proceedings."

In the **Epiphania's case** (supra) the Court of Appeal held:-

"Where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case."

It was further submitted on behalf of the applicant that Hon. G. Simba, Mediator, had no jurisdiction to issue the impugned ex-parte award. I agree with counsel for the applicant because that is the correct current position of the law. See [**Barclays Bank T. Limited vs AYYAM Matessa**](#) (Civil Appeal 481 of 2020) [2022] TZCA 189-Tanzlii. The Mediator who issued the impugned ex-parte award had no jurisdiction therefore the said ex-parte award cannot be left to stand.

It was submitted on behalf of the applicant that, applicant was neither served with summons for the date the dispute was scheduled for hearing prior to issuance of the order of ex-parte hearing nor the date of issuance of the ex-parte award. On the other hand, it was submitted by counsel for the respondent that applicant was duly served. With due respect, submissions that applicant was duly served is not supported by evidence on record. I have examined the CMA record and find that there is no proof that applicant was either served to appear for the date of hearing or on the date of issuing the said ex-parte award. I therefore find that there is merit in this ground. Respondent was supposed to serve the applicant before issuance of the order for ex-parte hearing and also after

the said hearing so that applicant could take necessary steps if she so wished. See ***Cosmas Construction's case*** (supra) and ***Abutwalib Musa Msuya & Others vs Capital Breweries Ltd & Others*** [2016] T.L.R. 12 (CA) also (Civil Revision 2 of 2012) [2016] TZCA 549-Tanzlii.

For all what I have pointed hereinabove, I allow the application, nullify CMA proceedings, quash, and set aside both the ex-parte award and the ruling dismissing an application to set aside ex-parte award.

Dated at Dar es Salaam on this 09th May 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on 09th May 2023 in chambers in the presence of Ms. Georgina Kinabo, State Attorney for the Applicant and Hassan Ally Hassan, the Respondent.



B. E. K. Mganga
JUDGE