

TANZANIA / JUDGMENT

REV NO 17918 OF 2024 AKO GROUP LIMITED VRS ROSEMUNDA JAMES MISANGIAH

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT DAR ES
SALAAM LABOUR REVISION NO. 17918 OF 2024 CASE REFERENCE NO. 202407251000017918
BETWEEN AKO GROUP LIM ITED.....APPLICANT VERSUS
ROSEMUNDA JAMES MISANGIAH..... RESPONDENT

JUDGEMENT

Date of last Order: 01/ 10/2024 Date of Judgement: 04/ 10/2024 MLYAMBINA. J. Before the Court the Applicant prays for this Court to call for records and examine the proceedings of the Commission for Mediation and Arbitration (herein CMA) at Kinondoni, Dar es Salaam in Miscellaneous Application No. CMA/DSM/MISC/13/2024{revise and set it aside. Arguing in support of the application Counsel Heri Zuku adopted the Applicant's affidavit to form part of his submission. He stated that the main point of their contention is that; the CMA did not deliberate on any of the grounds and their supporting authorities submitted by the Applicant despite of acknowledging those submissions at para 1 and 2 of page 2 and para 3 and 4 of page 3 and paragraph 1 of page 4 of the Ruling. i Counsel Zuku argued that; the CMA ought to have given reasons for either accepting or rejecting the Applicants authorities that were tendered. Thus, the requirement of giving reasons is enacted under Section 88 (11) o f the Employment and Labour Relations Act, [Cap 366 RE 2019] (herein ELRA). He argued that the provisions of Section 88 (11) (supra) apply mutatis mutandis to all miscellaneous proceedings emanating from arbitration proceedings. In support of his submission, he referred the Court to the Court of Appeal decision in the case of Mariana Mwamakula v. Stephen S. Mlewo, Civil Appeal No. 121 of 2021 (unreported), p. 13 where the Court stated: Reasons indicate that the decision maker brought his mind to bear on the subject matter on questions, it shows that the decision was not arbitrary. It was submitted by Counsel Zuku that the Arbitrator did not give reasons why he rejected the Applicants submissions to the effect that, when the status of the case changed from preliminary stages of arbitration to hearing, she was required to issue summons and that since no proof of summons was provided as required by the law, then the Arbitrator ought to have set aside the ex-parte Award and allow the matter to proceed interparty. Counsel Zuku added that; the record of

proceedings shows that the Applicant cited the case of Tanalec Ltd v. Jackson Basu, Labour 2 Revision No. 124 of 2018, High Court of Tanzania Labour Division at Arusha, p. 18 para 2. It says, when the status changed from preliminary stages to hearing, summons becomes imperative. Counsel Zuku went on to contend that; at page 4 of her Ruling, the Arbitrator stated that the first notice to attend arbitration was issued to the Applicant on 27/09/2022 for attendance on 10/10/2022. She further noted that because that summons was properly served and the Applicant did not attend, then there was no sufficient ground to set aside the ex-parte Award. He argued that conduct of Arbitrators is not arbitrary when a party fails to attend proceedings. To buttress his view, he cited Section 88 (8) of ERLA (supra), specifically para (a) when read together with Rule 28 (1) (b) of the Labour Institutions Mediation and Arbitration Guidelines GN No. 67 of 2007 (herein GN. No. 67/2007) and Rule 28 (1) (b) where it clearly states that; if the Respondent (the Applicant herein), fails to enter appearance, the Arbitrator has two options; either to proceed with hearing on the date of none appearance or postpone the matter. Counsel Zuku was of submission that; from records of the proceedings, the Arbitrator opted to postpone the matter and issued subsequent summons. This subsequent summons was admitted by the Respondent in the Counter affidavit before the CMA. Based on that 3 submission, the Applicant was surprised as to why in her Ruling Hon. Arbitrator focused on that one undisputed summons that called the parties to appear on 10/10/2022 and not the admitted subsequent summons which were never served to the Applicant. He was of belief that, if the Ruling of the CMA is left as it is, the Applicant will suffer miscarriage of justice. Thus, as clearly seen from the record, the CMA did not observe only the procedures guiding the conduct of arbitration proceedings and the Applicant's right to be heard was denied. He therefore urged the Court to grant the application. In reply, Counsel Emmanuel Msengezi for the Respondent adopted the Respondent's counter affidavit to form part of his submission. He distinguished the case of Tanalec Ltd (supra) which centres on the need to serve summons to the parties upon the matter changing stages from mediation to arbitration. In the cited case, the Mediator and the Arbitrator was the same person. He changed from being the Mediator to be an Arbitrator and he took the non appearance of the party against whom he issued an order to proceed ex-parte. He turned himself into an Arbitrator and issued an order to proceed ex-parte based on non appearance during mediation. In that context, it was his view that, it would have been proper for the Mediator who turned into arbitrator to issue summons. Counsel Msengezi distinguished the above circumstance with the case at hand on reason that in this case mediation was done by a different person and the Arbitrator was a different person. The Mediator was Hon. Mbunda and the Arbitrator was Hon. Igogo whereby it was the Arbitrator who issued the summons to appear for arbitration on 10/10/2022. The particular summons was well received by one Rose Maikoka and duly sealed with Ako group Ltd stamp of which they did not dispute. He added that the Applicant disobeyed the referred summons and on 10/10/2022 the Respondent prayed the matter to proceed ex-parte. The Counsel subscribed to the holding in the case of Tanalec (supra) at page 18 and 19 in which the Court held that: So long as the Mediator decided to fix the hearing on another date was duty bound to notify the Applicant. In the same line of argument, I decline to agree with Mr. Kamazima's contention that the Mediator was bound to postpone the mediation session because the Applicant had defaulted to appear before the CMA only once. It has to be noted that the law does not provide that there should be numerous

defaults in appearance for the Commission to exercise its discretion to determine the matter under Section 87 (3) (b) of ELRA. The fact that the Labour Court is the Court of equity does not mean that it condones laxity of the parties. It was Counsel Msengezi's further submission that in the case at hand, the Arbitrator was not bound to re-issue the summons after she had given her order to proceed ex-parte unless the Respondent had appeared and shown good cause. Responding to the argument that the Arbitrator did not give reason for her decision, he firmly denied. That, in the impugned Ruling, the Arbitrator summarised the parties' arguments and at p.4 para 4 of the impugned Ruling the Arbitrator stated as follows: After considering the arguments from both parties, I have noted that the Applicant's application seeks to have the Commission to set aside an ex-parte Award issued against them. The CMA has reviewed the proceedings and observed that the first notice to attend the Arbitration hearing was issued on 27/09/2022 requiring attendance on 10/10/2022 which the Applicant did not attend. The Commission has noted that the notice was properly served bears the official seal of the relevant office, therefore, it is clear that the Applicant was officially notified to attend the Arbitration hearing. Therefore, after reviewing the reasons provided by the Applicant, they do not sufficiently justify setting aside the ex-parte Award. On the basis of the above quotation, Counsel Msengezi submitted that the Arbitrator sufficiently provided reasons for her decision and therefore judiciously exercised her discretion to refuse to set aside the Ex-parte Award. Her decision was not arbitrary. In the upshot Counsel Msengezi urged the Court to dismiss the application for lack of merit. In rejoinder Counsel Zuku reiterated his submission in chief. I have duly considered the rival submissions of the parties, CMA and Court records and found that the Court is called upon to determine one issue; whether the Applicant adduced sufficient reason for setting aside ex- parte decision. Thorough examination of the record shows that when the matter was at mediation stage on 22/08/2022, the Respondent herein who was the Applicant at the CMA appeared in person. On the other side, Ms. Salome Faustine, appeared on behalf of the Applicant herein (the Respondent thereat). On the mentioned date, that is 22/08/2022 the matter was adjourned to 26/08/2022. Again, on the scheduled date, the Applicant did not appear, whereby mediation was marked failed and the dispute was ordered to proceed on other stage, which is arbitration. The record further shows that on 27/09/2022 a summons was issued for commencement of arbitration proceedings. The same was received by Ms. Rosemary Koka who signed and stamped it as appeared in the records. On the scheduled date for arbitration proceedings, that is on 10/10/2022, the Applicant did not appear. The Arbitrator ordered that summons be issued to the Applicant herein. Pursuant to the Arbitrator's order, the summons was issued and served to the Applicant. At paragraph 4 of the affidavit in support of the application for setting aside, the Applicant stated as follows: After mediation proceedings matter was forwarded to Hon. Igogo M, in which Applicant was served with summons which was ensured in 10/10/2022 requesting the Applicant to appear before the commission but the summons did not mention to whom (Arbitrator) the matter was forwarded to. It was the duty of the Respondent to notify the Applicant about when, where, and under which Arbitrator, arbitration proceedings were to be held. It is not true as held in the ex-parte Award that the Applicant disrespected the Commission for Mediation and Arbitration (CMA) by deliberately failing to appear before CMA after being served with summons. It is my view that the above averments are baseless, the summons is self

explanatory. The summons served on 27/09/2022 clearly informed the Applicant that the matter was scheduled on 10/10/2022 at 12:00 noon before the CMA Ubungu. On such basis, the above argument that the Applicant was not aware as to whom, when and where the Applicant was supposed to appear before the CMA is baseless. The Applicant willingly decided to disobey the CMA's order as rightly found by the Arbitrator. The action which cannot be condoned by this Court. I have further noted that the case of Tanalec (supra) is distinguishable to the case at hand. In the case at hand, the summons was issued after the matter was referred to arbitration proceedings already. The main contention in this matter is; whether the Applicant was dully notified o f the case or not In this case, it was proved that the summons was served to the Applicant. Under the circumstances, it does not matter as to the number of summonses served to the Applicant. The Applicant further contended that the Arbitrator did not give reasons for his decision. Looking at the impugned ruling, the reasons are reflected at paragraph 2 of page 4. I also examined other reasons adduced by the Applicant and found that they have no merit. The Applicant was dully afforded the right to be heard but he willingly neglected to appear and defend himself. In the result, I find no justifiable reason to fault the Arbitrators findings. The CMA's decision is hereby upheld. This application is dismissed accordingly. It is so ordered. Y J ^ M L V A f4 ^ JUDGE 04/10/2024 Judgement pronounced and dated 4th October, 2024 in the presence of Counsel Mangius Audax for the Applicant and Emmanuel Msengezi for the Respondent. Right of Appeal explained Y J. NJLYAMBINA JUD< 04/10/2024

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