

TANZANIA / JUDGMENT

FIDES TANZANIA LTD

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA [ARUSHA SUB RGISTRY] AT ARUSHA REVISION NO. 18126 OF 2024 (Arising from the award of the Commission for Mediation and Arbitration at Arusha in CMA/ARS/ARS/07/23/75/23) BETWEEN FIDES TANZANIA LTD..... APPLICANT VERSUS SHAMIM SHABANI MSANGI..... RESPONDENT JUDGEMENT 04/11/2024 & 29/11/2024 M WEN DA, J. The applicant, FIDES TANZANIA LTD has filed the present application seeking this court's interventions to revise the award of the Commission for mediation and Arbitration (CMA). This application is pegged on four grounds articulated at paragraph 12 of the applicant's affidavit. The same go as follows, that; -

- a) The legality and propriety of the Commission's finding for failing to give due weight to the applicant's letter dated September 8, 2024 which requested an adjournment of the hearing and proceeded to close the 1 | Page applicant's case, thereby denying the right to summon his remaining key witness to adduce evidence and depriving the appellant of his fundamental right to be heard,
- b) The legality, propriety and validity of the Commissions' award to order the applicant to pay the respondents the monetary relief of TZS 34, 357,889/= allegedly being compensation for unfair termination without any justifiable reason while the respondent filed the prematurely filed dispute before Commission, (sic)
- c) The legality, property and validity of the Commission's finding to order the Applicant to pay the Respondent compensation without any justifiable reasons.
- d) The legality, propriety and validity of the commission in holding the current applicant liable for the unfair termination of the Respondent. The brief background of the matter is that the respondent was employed by the applicant on 1st day of June 2014 as an Operation Officer, but her service was terminated on 07/12/2024. Such decision aggrieved her and as such she preferred a complaint before the Commission for Mediation and Arbitration (CMA) on 6/01/2023. Before the CMA, she alleged she was unlawfully terminated hence she prayed for 12 months' compensation for unfair 2 | Page termination, severance pay to a tune of TZS 4,268,062/=, Leave not taken to a tune of TZS 3,337, 96/= and certificate of service. Having heard and considered the evidence from both sides, the Hon. Arbitrator decided in favour of the respondent on the ground that the termination was substantively and procedurally

unfair. The applicant was then condemned to pay TZS 34,357,899/= comprising 12 months' compensation for unfair termination, severance pay /=; 7 days salary for December 2022, Leave not taken and certificate of service. The CMA's decision did not please the applicant as such she knocked at the doors of this Court praying the CMA's decision to be quashed and set aside. When this matter was called on for hearing the applicant was represented by Mr. SALVATORY MOSHA, Advocate, whereas the Respondent was represented by Mr. KENETH OCHINA, learned Advocate. With the leave of the court the hearing proceeded by way of written submission and both parties complied to the scheduling order. Arguing the grounds for application Mr. SALVATORY MOSHA submitted that the CMA violated the fundamental right to be heard for its refusal to adjourn the hearing and arbitrarily close the Applicant's case despite the legitimate 3 | Page request of the applicant to do so which was supported by a letter dated 8th September 2024. Further to that, Mr. Mosha submitted that the applicant was denied the right to be heard as he failed to call the remaining key witnesses to adduce evidence such as Human Resource Officer. According to Mr. Mosha, the Arbitrator had no power to close the applicant's case, and this position was supported by citing the case of DAID MIIISHI V. ABDALAH MSHAM KITWANGAC, CIVIL APPEAL NO. 286 OF 2016 Court of Appeal quoted with approval the case of ABDALAH KONDO V. REPUBLIC, CRIMINAL APPEAL NO. 322 OF 2015 (UNREPORTED) where the court insisted that a magistrate or a judge has no power to close, neither the prosecution nor defence case. On top of that he referred to Article 13 (6) of the Constituting of United Republic of Tanzania which guarantees every person to a fair opportunity to present their case. He opined that the applicant's case prematurely closed thus the decision reached under such condition is void. Mr. Mosha also faulted the Arbitrator's reasoning for refusal to adjourn the hearing. He said that the reasoning that the said matter was under a special hearing session and his suspicion that the applicant aimed to delay the proceedings while after the respondent had tendered her evidence on 11/9/2023, the award was not issued until the 14/6/2024, nine months later, 4 | Page a delay which, according to him, contradicts the original reasoning of expeditious handling of the matter. He supported his argument by citing the Case of GURMIT SINGH V. MEET SINGH AND ANOTHER, CIVIL APPEAL NO. 256 OF 2018 where the court insisted the need of balancing the need for expeditious proceedings with ensuring justice for both parties. Having said so, he prayed for this court to protect the right of hearing by granting this application and to quash and set aside the CMA's proceedings and award dated 14th June 2024. In rebuttal Mr. Ochina firstly raised a concern that this application is incompetent for the applicant's failure to file Form No. 10 as per Regulation 34(1) Employment and Labour Relations Act (General Regulations) G.N 47 of 2017. He was of the view that the mentioned provisions require every person who is aggrieved by the CMA's decision to file the Form No. 10. For that reason, he prayed the present application to be dismissed for being incompetent. Regarding the argument by the learned counsel for the applicant in that the dispute was prematurely filed at CMA as the respondent was not yet terminated, Mr. Ochina submitted that as the respondent was issued with a 5 | Page retrenchment letter (Exhibit P3), that by itself was a proof that she was already terminated from work. Regarding the main issue that the applicant was denied the right to be heard, Mr. Ochina submitted that when

the matter was called on for hearing on 05/09/2024, the counsel for the applicant was not ready to proceed with hearing on an excuse that all the witnesses were at the funeral thus the matter was then adjourned to 07/09/2024. Further to that he said that when the matter was called on for hearing on 07/09/2024, Mr. Mosha changed the story while asking for summons to issue, that the witnesses had not returned from the funeral while others government officials failed to appear and for the sake of justice, the Hon. Arbitrator issued an order for the last Adjournment until 11/09/2024 when the matter was set for hearing. The learned counsel said that all these facts transparently show how the CMA accorded the Applicant with the wide range of time and right to be heard justly. It was Mr. Ochina's further submission that before the CMA, the matter was scheduled on Session Program, and by that time, the Respondent had only three "3" day from labor (giving birth to her little child), but appeared for 6 | Page hearing, the fact which according to Mr. Ochina, lead to a conclusion that the reasons assigned are empty, unfounded, unprecedented and mischievously deployed. Further to that, Mr. Ochina opined that the Applicant herein was accorded opportunity to present his case and defend the same and thus it is strange for her to state that she was denied the right to be heard while she summoned Four Witnesses (DW1 to DW4) of her own choice. According to Mr. Ochina, the alleged letter seeking for adjournment which is claimed to be filed before the CMA has never been served to the Respondent herein or her Advocate. He believes there is doubts if such document ever existed. Regarding the relief claimed by the counsel for the applicant that the CMA's award be quashed and set aside, the learned counsel for the respondent was of the view that the Arbitral Award was Valid, Fair and verified and in accordance with the law. Having examined the CMA's record and the parties' arguments, the issue for determination whether the Hon. Arbitrator denied the applicant the right to be heard. 7 | Page Before embarking on the merit of the matter, it is pertinent to respondent to the issue raised by the learned counsel for the respondent that this application is incompetent for the applicant's failure to attach Form No. 10 as required by Regulation 34 (1) Employment and Labour Relations Act (General Regulations). Principally, the requirement of filing Form No. 10 is aimed at prompting the CMA to forward the certified copies of the proceedings, judgment, and decree or order to the High Court (this court). In this matter, the said papers, i.e. the proceedings, judgment, and decree of the CMA are availed to this court, thus in the circumstances of this matter, the Applicant's failure to file Form No. 10 at CMA is curable under Section 3B of the Civil Procedure Code, [Cap 33 R.E 2019] by invoking the oxygen principal. Also See the case of GUARDIAN LIMITED VS EDMUND MSANGI (Civil Appeal No. 453 of 2021)

- [2024] TZCA 1117 (15 November 2024) (Tanzlii). Back to the merit of the application, it has been emphasized many times without number that the right to fair hearing is a fundamental principle of natural justice which should be observed by all courts in the administration of justice. This is a constitutional right covered under Article 13 (6) (a) of 8 | Page the Constitution of the United Republic of Tanzania, 1977 which provides as follows, that: - "When the rights and duties of any person are being determined by the court or any other

agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned." (Emphasis is mine] See also the case of ABBAS SHERALLY AND ANOTHER V. ABDUL S. H. M. FAZALBOY, Civil Application No. 33 of 2002 (Unreported). In the present application, I have revisited the records of the CMA and noted that when the matter was called on for hearing on 05/09/2024, the learned counsel for the Applicant prayed for adjournment as their witnesses were absent as they attended the funeral. Based on such prayer, the matter was then adjourned to 07/09/2024 where again, the learned counsel for the applicant sought for adjournment the ground being that their witnesses were still at the funeral and some needed service to appear as they were Government employees. While acknowledging that the said application was a backlog, he prayed for the 9 | Page last adjournment. Despite resistance from the respondent's side, the matter was adjourned to 11/9/2023 for hearing. The record shows that on 11/9/2023 when the matter went for hearing, the learned counsel for the respondent paraded four witnesses and at the end of the day, he prayed for an adjournment on the ground that the remaining witness was on annual leave. His prayer was strongly opposed by the learned counsel for the respondent and having heard them, the trial arbitrator refused to adjourn the hearing since that date was after the last adjournment. As such, the trial Arbitrator closed the applicant's case as he believed the applicant intended to delay the hearing of the matter in question by deploying delaying tactics. After that and on the same date, the Commission proceeded to hear the respondent's case which was closed on the same date of 11/9/2023. After such closure, the Arbitrator fixed the 27/10/2023 as the date for issuing an award. Interestingly the award was not delivered as ordered 14/6/2024, almost nine months after the closure of the respondent's case. From the above, it is evident that on 11/9/2023 when the applicant paraded four witnesses, he could not conclude as she had one pending witness. As she prayed for another adjournment, the Hon. Arbitrator declined as the previous date was the last adjournment. Subsequently he closed the 10 | Page applicants case before he allowed the respondent to fend her case, which she did on the same date and closed. The question which one must ask is whether the Hon. Arbitrator was justified when he closed the applicant's case? Although his reasoning was that the applicant was deploying delaying tactics, the closure of the applicant's case was not proper. As hinted above, the law forbids the court from closing the party's case. See DAID MUSHI V. ABDALAH MSHAM KITWANGAC, (supra). On that note, by so doing the applicant was denied the right to be heard, thus the proceeding from that point of closure is tainted with illegality eligible to be nullified. Again, despite the Arbitrator's stance that ,that matter was fixed in the special session which ought to be concluded the soonest, he did not deliver any award for more than nine months from the date of the last order far beyond the 30 days' time prescribed by the law, i.e. Section 88 (9) of the Employment and Labour Relations Act [Cap 366 R.E 2019]. With such delay this court is of the view that the ground of rejection to further adjourn the hearing of the applicant's case was unjustified and in event, it occasioned injustice on the applicant. From the foregoing reasoning, this court is of the firm view that the applicant was denied the right to be heard which rendered the

whole proceedings from 11 | P a g e 11/ 9/2023 after the closure of the applicant's case a nullity and the same is hereby nullified. In the end this application is partly allowed and, the award and the proceedings of the CMA from 11/9/2023 is hereby quashed and set aside. It is also ordered the matter to be remitted back to the CMA for rehearing from 11/9/2023, a point before the Hon. Arbitrator closed the applicant's case. It is so ordered. DATED at ARUSHA this 29th day of November 2024. 12 | P a g e

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