

TANZANIA / JUDGMENT

godfrey g mpumlo 11 others vs lambo motel 2022 tzhcld 987 3 october 2022

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM REVISION
APPLICATION NO. 57 OF 2022 {Arising from the decision of the Commission for Mediation and
Arbitration of Dar es Salaam at Kinondoni dated 22nd day of March 2019 in Labour Dispute No.
CMA/DSM/KIN/R.921/16 by (William: Arbitrator) GODFREY G. MPUMLO & 11 OTHERS.....
APPLICANTS VERSUS LAMBO MOTEL..... RESPONDENT

JUDGEMENT

12th September 2022 & 03rd October 2022 K. T. R. MTEULE, J. This Revision application emanates from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni (CMA) in Labour Dispute No. CMA/DSM/KIN/R.921/16. The prayers contained in the Chamber summons are seeking for this Court to be pleased to revise the proceedings and the decision pronounced by the CMA in the aforesaid labour dispute and quash the decision of therefrom dated 22nd March 2019 which decided that the complainants filed the dispute out of time. The Applicant is praying for any other relief(s) deemed appropriate. 1 The brief background of the dispute leading to this application is grasped from CMA record, affidavit and counter affidavit filed by the parties as stated hereunder. The applicants were employed by the Respondent in unspecified period under oral contract. On 12th May 2016 their employment relation turned sour after the closure of respondent's business by Municipal Council's inspection which found some shortfalls in its environment to support hotel business. The business was closed with allowance to reopen upon finalization of rehabilitation. From there the respondent failed to pay salaries which triggered the claim in the CMA. The CMA counted the period of delay from the date when the respondent halted salary payment which was May 2016 and decided the matter to have been time barred, consequently, dismissed it. The CMA decision aggrieved the Applicants hence the present application. At paragraph 12 of their affidavit, the Applicants advanced three grounds of revision as follows: -

- i) That the decision from the Commission for Mediation and Arbitration is tainted with material irregularity. ii) That the Commission erred in law and fact by deciding on an issue which was not framed by the parties, an issue which 2 determined the matter to its finality and that the parties were not heard on merit. iii) That the Commission failed to consider that since the applicants were not accorded with the right to be heard during the

Disciplinary Committee then its ruling was tainted with material irregularities. Both parties to the application were represented. The Applicants were represented by Miss. Kashi ndye Thabit, Advocate, whereas the Respondent was represented by Mr. Mwambene Adam, Advocate. Upon prayers by the parties, the Court ordered for the application to be disposed of by a way of written submissions. I thank both parties for complying with the Courts schedule, and I appreciate their rival submissions which will be considered in determining this application. Arguing in support of the application Miss. Kashindye submitted that the decision of the CM A was tainted with material irregularity as the same was not centered on the issues framed as per page 2 of the award. He stated that the CMA arrived on its decision by relying on other factors and disregard the evidence tendered by the applicant in its entirety hence leading to material irregularity on the award issued. 3 It was further submitted by Miss. Kashindye that it is trite principle of law under Rule 28(1) (c) and (d) of the Labour Court Rules, G.N No. 106 of 2007, that this Court may revise any proceedings of CMA for the reason of material irregularity. On the second legal issue, Miss. Kashindye submitted that the Commission issued an award which was centered on issue which was not framed by the parties and determined the matter without affording parties with a right to be heard on the said issue. Supporting his position, he cited the case of Beach Residence Ltd t/a Ramada Resort Dar es salaam v. Suleiman Mathew Misalaba, Revision Application No. 07 of 2019, High Court of Tanzania, Labour Division, at Dar es salaam and stated that a decision of a court needs to be centered on framed issues. On the third issue Miss. Kashindye submitted that the Commission failed to consider that the applicants were not accorded with the right to be heard during disciplinary hearing. In this regard, he is of the view that the CMA decision was tainted with material irregularities. He further added that applicants had never afforded with an opportunity to be heard at Disciplinary hearing contrary to Article 13(6)(a) of the Constitution of United Republic of Tanzania. 4 Lastly it was submitted by Miss. Kashindye that the respondent did not comply with the procedure in terminating applicants' employment. That means their termination was not in accordance with Section 37(2) (c) of the Employment and Labour Relation Act, Cap 366 R.E 2019. Responding to the application, Mr. Mwambene Adam submitted that there is no material irregularity in the award of the Commission for Mediation and Arbitration. According to him the Arbitrator was right not to proceed with the determination of the dispute on its merits before she could ascertain whether or not the CMA had jurisdiction to entertain the dispute. He stated that upon perusal of the records she discovered that the dispute was preferred to the CMA out of time, and without any application for condonation, hence time barred. In his view, the CMA had no jurisdiction to entertain the matter. Supporting his arguments, he cited different cases including the case of Maurice Rondo & 113 others versus CCBRT, Misc. Labour Application No. 463 of 2016, and the case of Richard Julius Rukambura versus Issac N. Mwakajila & Another Civil Application No. 3 of 2004, Court of Appeal of Tanzania, at Dar es salaam, (unreported). Mr. Mwambene Adamu submitted that the arbitrator having ascertained that the dispute was preferred to the CMA out of time and without any 5 application for condonation, the hands of the Commission became tied up to determine the dispute on its merits. He is of the view that in the light of the above position, the second ground for

revision must also fail because the Arbitrator was confronted with a matter in which the issue of jurisdiction was being challenged by a way of preliminary objection which was raised by the respondent and the parties had already addressed the CMA. Concerning the third ground of revision, Mr. Mwambene Adam submitted that the applicants Counsel have grossly misconceived the differences between the Applicants and Respondents. He submitted that it was the Respondents case that the Applicants were not terminated by the Respondents for any reason of misconduct but rather closure of the business by the order of the Municipal authorities which gave time for the respondent to undertake rehabilitation of its sewage systems. According to Mr. Mwambene, the closure of the business was not done by wish of either of the parties in the employment contracts. He emphasized that the closure was duly communicated to all applicants. It was further submitted by Mr. Mwambene that there was no disciplinary hearing of any because there was no misconduct committed. In his view, it can be said that it was the applicant who terminated their 6 employment contracts. In such circumstance he is of the view that the case of Zakaria Mkumbo versus Holly Peak Academy, Labour Revision No. 35 of 2021 (High Court at Arusha Registry) is quite irrelevant to the circumstances of present case. He thus prayed for the application to be granted. The Applicants filed rejoinder. In the rejoinder, the applicant introduced new submissions which could not be responded by the respondent. I have disregarded the contents which claimed that the application was timely filed. This is neither an issue in the affidavit, nor a part of submission in chief. Raising it in rejoinder is not appropriate. For the arguments which rejoined the reply to submission, I will take them into account while considering this application. Guided by the submissions made by both parties, the applicants affidavit, the Respondents counter affidavit and CMA record, I formulate one issue for determination which is whether the applicants have provided sufficient ground for this Court to revise the CMA award. In approaching the above issue, the grounds identified in the affidavit will be considered one after another. Starting with the first ground, it is alluded by applicant's Counsel that the decision of the CMA is tainted with material irregularity for being not centered on the issues framed. On the other hand the respondents Counsel averred that the Arbitrator was right not to proceed with the determination of the dispute on its merits, on the reason that upon perusal of the records she discovered that the dispute was preferred to the CMA out of time. The CMA record reveals that parties were heard on a preliminary objection which was raised by the respondent to challenge the timeliness of the labour dispute No. Labour Dispute No. CMA/DSM/KIN/R.921/16. Having heard the parties the arbitrator Ng'washi, Y reserved a Ruling which appears to have been delivered on 17th November 2017 where the preliminary objection was dismissed. The matter proceeded with hearing. The issue of timeliness of the labour dispute in CMA resurfaced when the arbitrator was composing his ruling. Having noted the previous arbitrator's dismissal of the preliminary objection, he kept on asking himself as to whether the matter was timely filed in the CMA. He proceeded to address whether the labour dispute was timely filed or not and concluded that the matter was out of time and dismissed the entire application. It is apparent in the ruling of Hon. Ng'washi, Arbitrator that the reasons for her decision was that the preliminary of objection was not a point of law but a matter

which needed prove. She found so due to the fact that one of the disputed issues was whether there was a termination of the applicants employment. There could be no possibility of deciding the timeliness without knowing when the termination took place. Without having a prove of existence of such termination she could not decide on the issue of time. However, Hon. Ng'washi dismissed the application. The main contention by the applicant is that the arbitrator addressed a matter which was not an issue. I agree with the applicant. The issue of time was already addressed by the previous arbitrator which dismissed the preliminary objection. Arbitrator William did not have jurisdiction to re-determine the preliminary objection which was already dismissed by a fellow arbitrator. This irregularity can only be cured by re-hearing of the matter where the evidence will be evaluated to find out as to whether there was a termination or not before knowing the timeliness of the application. It is to be noted that time begins to count from the date of termination. Arbitrator William could only proceed with what she did, if there could be no dismissal order to the preliminary objection. With this irregularity, I allow the application and quash the entire CMA proceedings with leave to reinstitute it if any of the parties is still interested to pursue it. The reinstitution of the application in the CMA, if preferred by either of the parties, must be done within 21 days from today. Dated at Dar es Salaam this 3rd day of October 2022. KATARINA REVOCATI MTEULE JUDGE 3/10/2022 io

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