

TANZANIA / JUDGMENT

ndaro bwiru songora vs mwinuko secondary school 2024 tzhc 123 6 february 2024

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IN THE HIGH COURT OF TANZANIA (MWANZA SUB-REGISTRY) AT MWANZA LABOUR
REVISION NO. 94 OF 2016 (Arising from the Labour Dispute No.CMA/MZ/NYAM/377/2016 in the
Commission for Mediation and Arbitration at Mwanza) NDARO BWIRU
SONGORA.....APPLICANT VERSUS MWINUKO SECONDARY
SCHOOL.....RESPONDENT

RULING

Date of Last Order:08/11/2023 Date of Ruling:06/02/2024 KAMANA, J. This application arises from the decision of the Commission for Mediation and Arbitration (CMA) for Mwanza in which the CMA, upon an application by the respondent, set aside its ex-parte award. The said ruling did not please the applicant who preferred the current application seeking to reverse the decision. Hearing of the application saw Mr. Marwa Chacha Kisyeri, the Personal Representative of the applicant and Mr. Patrick Mhere, learned Principal State Attorney representing the respondent. The application was disposed of by way of oral submission. Submitting on behalf of the applicant, Mr. Kisyeri began by adopting the affidavit sworn by the applicant and argued that the first, 1 second and third paragraphs of the affidavit are facts to be received as they speak for themselves. He contended that according to paragraph 3 of the affidavit, the mediator revoked his ex-parte decision dated 6th April, 2016 as per annexure NB56 dated 7th October, 2016. According to him, such a decision went contrary to the law as the CMA had no authority to revoke its own decision which was binding and enforceable save for corrections if there were errors. He kept on contending that if the ex-parte decision aggrieved the respondent, he could have applied for revision before this Court within 42 days to challenge it. He maintained that an arbitration award binds the parties in the sense that the CMA cannot reopen it. He stated further that when the award is granted, it amounts to a decree of the Court of competent jurisdiction. In that case, Mr. Kisyeri held the view that the CMA, after issuing an ex-parte decision, became functus officio with no jurisdiction to revisit its records including the evidence that was heard and nullify the same. To bolster his averments, he cited provisions under sections 89 (1), (2), 91 (1) (a), (b), (2) (a), (b), (c), (4) (a), (b) and 94 (1)(b) (i) of the Employment and Labour Relations Act, Cap.366 (EALRA)

and the 2 case of *The International Airline of the United Arab Emirates v. Nasser Nasser*, Civil Application No. 379 of 2019-CAT (Unreported). Regarding time limitation, he argued that the application that led to the annulment of the ex-parte decision was filed out of the prescribed time. He contended that the law provides for 14 days within which a party may apply to set aside or correct an award granted during the arbitration. He decried that the said application was filed on 25th May, 2016 which was late by 53 days, in violation of rule 30 (1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 (GN No. 64 of 2007). He added that according to section 90 of the EALRA which has been referred to under rule 30 of the GN. No. 64 of 2007, the CMA has powers to correct arbitration awards regarding clerical mistakes or errors arising from any accidental slip or omission but this provision does not involve setting aside of its ex-parte award. He insisted that powers to set aside ex-parte awards are only reserved to the Labour Courts. He cited the decision in the case of *G45 Secure Solution (T) Ltd vs Restituta Rweyemamu*, Revision Case No. 95 of 2017-HC (Unreported) to strengthen his arguments. Mr. Kisyeri went on to state that on 25th May, 2016 when the application for setting aside the ex-parte decision was filed at the CMA, there was an Execution Case No. 25 of 2016 seeking to execute the CMA's ex-parte decision of 4th April, 2016. He decried that the CMA interfered with the execution by setting aside its decision. He furthered his contention that according to rule 48 (3) of GN. No. 106 of 2007, where there is an appeal, review or reference before the Court, the final decision including an award shall be enforced by the Court. Based on that he held the view that the CMA did not have jurisdiction to halt execution proceedings which occasioned a miscarriage of justice on the part of the applicant. In the end, he prayed this Court to quash and set aside the decision of the CMA that set aside its ex-parte decision to allow the execution proceedings to proceed and the applicant to be awarded his entitlements from the date of the termination which is 1st June, 2015 to date. In reply, Mr. Mhere contended that the personal representative for the applicant has failed to mention the law that prohibits the CMA from setting aside its ex-parte decision. Concerning the cited case of *G45 Secure Solution (T) Ltd vs Restituta Rweyemamu* (Supra), he held the view that the same is distinguishable as in that case, the CMA overruled its decision instead of reviewing it. 4 On filing the application out of time, Mr. Mhere was of the view that the argument should not be considered as it was not pleaded in the chamber summons. Lastly, he prayed this Court to find the CMA's decision as correct and maintain it. In his laconic rejoinder, Mr. Kisyeri reiterated his submission in chief. He went on to argue that the issue of time limit is pleaded in the affidavit. Having heard the rival submissions by the parties, I thought it necessary first to determine whether the CMA under mediation proceedings may enter an ex-parte decision and pronounce an award. Given that, I invited the parties to address the issue. Submitting on behalf of the respondent, Mr. Mhere contended that the mediator in the CMA proceedings has no powers to proceed ex-parte and issue an award. Given that, the learned Principal State Attorney urged the Court to issue necessary orders as the mediator when issued an ex-parte award on 4th April, 2016 had no such powers. Responding, Mr. Kisyeri was of the view that the mediator has powers to proceed ex-parte when the respondent does not enter appearance. To bolster his views, he cited section 87(3)(b) of the EALRA 5 which gives the mediator the power to decide the complaint if one party fails to attend the mediation. Mr. Kisyeri went on to argue that the provisions of rule 8(4) of the Labour Institutions (Ethics and Code of

Conduct for Mediators and Arbitrators) Rules, 2007 (GN No. 66 of 2007) states clearly that a mediator may issue an award when the respondent fails to attend mediation hearing. To strengthen his argument, Mr. Kisyeri referred this Court to the provisions of rule 14(1)(a)(ii) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (GN No. 67 of 2007) which provides that a mediator may decide complaint if the other party to the complaint does not enter appearance. First and foremost, I thought it relevant at this point to reproduce the provisions of section 87(3)(b) of EALRA cited by Mr. Kisyeri as follows: ‘(3) In respect of a complaint referred under this Act, the mediator may –

- (a) dismiss the complaint if the party who referred the complaint fails to attend a mediation hearing; 6
- (b) decide the complaint if the other party to the complaint fails to attend a mediation hearing.’ Likewise, the provisions of rule 14(2)(a)(ii) of GN No. 67 of 2007 provides: ‘(2) Where a party fails to appear at mediation, the mediator may do the following-
 - (a) in the case of the complaint the Mediator may postpone the hearing in accordance with rule 15 or may-
 - (i) dismiss the complaint if the referring party fails to attend a mediation hearing during the initial 30 days period; (ii) decide the complaint if the other party to the complaint fails to attend a mediation hearing.’ Deducing from the provisions of section 87(3)(b) of the EALRA, it is crystal clear that a mediator is vested with the powers to decide the 7 complaint ex-parte if the party, other than the complainant, fails to appear on the date set for the mediation hearing. The complaints that the mediator may decide ex-parte are those complaints interpreted in section 4 of the EALRA as disputes arising from the application, interpretation or implementation of an agreement or contract with an employee; a collective agreement; EALRA or any other written law administered by the Minister responsible for labour and part VII of the Merchant Shipping Act. The interpretation of the complaint is provided as follows: “complaint” means any dispute arising from the application, interpretation or implementation of –
 - (a) an agreement or contract with an employee;
 - (b) a collective agreement;
 - (c) this Act or any other written law administered by the Minister;
 - (d) Part VII of the Merchant Shipping Act;’ That being the position, the question that arises naturally is whether the issue that was presented before the CMA for mediation was a complaint or otherwise. To answer the question, I thought it relevant to peruse the records. According to the records, the applicant in this 8 matter filed a dispute for the determination of the CMA according to section 86(1) using CMA F.1. Section 86(1) provides: ‘86. -(1) Disputes referred to the Commission shall be in the prescribed form.’ According to section 4 of EALRA, a dispute has been interpreted as a dispute between an employer and an employee or between the employers' association and the registered trade union over the

labour matter. The said interpretation recognises the alleged dispute as a dispute within the context of the EALRA. The section reads: "dispute"-

- (a) means any dispute concerning a labour matter between any employer or registered employers' association on the one hand, and any employee or registered trade union on the other hand; and
- (b) includes an alleged dispute;’ What is labour matter envisaged in the interpretation quoted above? According to section 3 of the EALRA, labour matter means any matter relating to employment or labour relations. 9 Given that, a dispute in the context of the EALRA bears a different meaning from a complaint. In CMA F.1, the applicant cited termination as a type of dispute he referred to CMA. From the definition of the complaint, it is clear that termination has nothing to do with the application, interpretation or implementation of an agreement or contract with an employee; a collective agreement; EALRA or any other written law administered by the Minister responsible for labour and part VII of the Merchant Shipping Act. In other words, the applicant did not seek intervention from the CMA with respect to the application, interpretation or implementation of the mentioned instruments. In view of that, Mr. Kisyeri’s argument that the mediator under section 87(3)(b) of the EALRA has powers to proceed ex-parte in determining a dispute is devoid of merits as such powers are only limited to complaints. In his submission, Mr. Kisyeri also supported his arguments through rule 14(2)(a)(ii) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (GN No. 67 of 2007). Without much ado, I hasten to state that since section 87(3) (b) of the EALRA states vividly that mediators may decide a complaint ex-parte when the party, other than the referring party, fails to enter an appearance, Rule 10 14(2)(a)(ii) of GN 67 of 2007 has to be accorded with the same interpretation I have already given. One may argue that GN No. 67 of 2007 has been made under the Labour Institutions Act, Cap.300 [RE.2019] and not EALRA, and hence the interpretation of the word “complaint” should not exclude a word “dispute”. Much as the argument may sound reasonable, I am not prepared to succumb to that on the reason that the procedures for regulating the reference of a dispute or a complaint to CMA are provided under the EALRA. The Labour Institutions Act serves the purpose of establishing labour institutions and providing their functions and powers. I understand that according to the Labour Institutions Act, the Commission has powers to make Rules regulating its proceedings. However, such Rules cannot be inconsistent with the EALRA to the extent of vesting powers to mediators to decide a dispute when the party, other than the referring party, fails to enter an appearance at the mediation hearing. In his submission, Mr. Kisyeri supported his arguments by citing rule 8(4) of the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, 2007 (GN No.66 of 2007) which provides: 11 ‘(4) Where a party other than the applicant fails to attend at the mediation hearing, the mediator may issue an award deciding on a complaint.’ From the abovementioned provisions, I do not hesitate to state that the powers are limited to complaints and not disputes as I have already elucidated above. Before I pen it off, I think it is of utmost importance to state that the spirit of mediation promotes an amicable settlement of the disputants and not adjudication by the third party. It is the sole role of the

parties to the dispute to resolve their differences independently of the mediator. The role of the mediator should be limited to facilitating the mediation process and not imposing his or her decision on the parties. It goes without saying that when the mediation process fails for any reason other than the failure of the referring party to attend the mediation, the mediator is required to mark the mediation as failed to pave the way for the disputants to seek settlement by using another mechanism. Having stated so, I invoke my revisionary powers by setting aside an ex-parte award issued by the CMA on 4th April, 2016. That being the position, the decision of the CMA dated 7th October, 2016 that triggered 12 the instant application lacks legs to stand. I further order that this matter be remitted to the CMA to proceed with immediate effect from where it was before the decision dated 4th April, 2016. It is so ordered. Right To Appeal Explained. DATED at MWANZA this 6th day of February, 2024. KS KAMANA JUDGE 13

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