

TANZANIA / JUDGMENT

north mara gold mine vs john milindi makoko 2023 tzhc 20526 31 august 2023

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31 August 2023

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THE UNITED REPUBLIC OF TANZANIA (JUDICIARY) THE HIGH COURT - LABOUR DIVISION
(MUSOMA SUB REGISTRY) AT MUSOMA (Revisional Jurisdiction) LABOUR REVISION No. 14 OF
2023 (Arising from the Commission for Mediation and Arbitration of Musoma at Musoma in
Labour Dispute No. CMA/MUS/231/2021) NORTH MARA GOLD MINE LIMITED.....
APPLICANT Versus JOHN MILINDI MAKOKO..... RESPONDENT

RULING

28.08.2023 & 31.08.2023 Mtulya, J.: Section 91 (1) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] (the Labour Act) provides, in brief, that: any party to an arbitration award who alleges a defect in any arbitration proceedings under the auspices of the Commission for Mediation and Arbitration may apply to this court for a decision to set aside the arbitration award. Sub section 2 of section 91 of the Labour Act provides that this court may set aside an arbitration award, when: first, there was a misconduct on the part of the arbitrator; second, the award was improperly procured; and finally, the award is unlawful, illogical or irrational. The present applicant, North Mara Gold Mine Limited (the applicant) was aggrieved by the award of the Commission for Mediation and Arbitration of Musoma at Musoma (the i Commission) in Labour Dispute No. CMA/MUS/231/2021 (the dispute) hence rushed to this court on 24th July 2023 and lodged Labour Revision No. 14 of 2023 (the revision) praying for this court to call for the record and proceedings of the Commission in the dispute and proceed to revise and set aside the award issued on 13th June 2023. However, before the arbitrator in the Commission took his proceedings for arbitration in the dispute, the mediator had previously taken two (2) essential roles in the Commission, namely: first, ruled on condonation in favor of Mr. John Milindi Makoko (the respondent); and second, mediated the dispute before forwarding the same to arbitrator, of course, after decline of the parties to cherish amicable settlement of their differences in the dispute. The applicant was unexcited with the ruling on condonation in favor of the respondent, but could not prefer revision as there is no such pigeon hole in the Labour Act, the Labour Institutions Act [Cap. 300 R.E. 2019] (the Institution Act), Labour Court Rules, GN. No. 106 of 2007 (the Labour Rules), the Labour Institution (Mediation and Arbitration) Rules, GN. No. 64 of 2007 (the Mediation Rules), or any other labour enactments. 2 Seeing there is no enactments to dispute the condonation ruling, the applicant invited the same enactments in section 91 of the

Labour Act in the current revision and prayed to this court to call for record and proceedings of the Commission in the condonation and proceed to revise and set aside the ruling issued on 18th May 2021. The revision was scheduled for hearing on Monday, this week, 28th August 2023 at noon hours. However, before necessary materials for and against the revision were produced, the respondent's personal representative, Mr. Marwa Chacha Kisyeri raised up and complained that the applicant has mixed up issues which renders the revision incompetent for want of the law in section 91 of the Labour Act. When Mr. Kisyeri was prompted to explain his protest, he submitted that the law enacted in section 91 of the Labour Act was enacted in such a way that it only allows revision with regard to arbitration awards without any enactment in condonation rulings. In the opinion of Mr. Kisyeri, the applicant has brought in this court omnibus application without any support of the law, and one of them was out time. According to Mr. Kisyeri the prayer on revision of the arbitration award were brought within six (6) weeks as per section 91 (1) (a) of the Labour Act, but the prayer on 3 condonation ruling was brought after six (6) weeks contrary to section 91 (1) (a) of the Labour Act. in order to persuade this court to follow his course, Mr. Kisyeri submitted that the ruling granting condonation was resolved during mediation process by a mediator before the main suit by the arbitrator hence mediation proceedings cannot be revised at this court in the revision. Finally, Mr. Kisyeri produced the authorities of this court in the precedents of Amos David Kassanda v. Commissioner for Lands & Another, Misc. Land Case No. 457 of 2020 and Fatma Mukangara & Another v. The Attorney General, Misc. Land Application No. 99 of 2012, which prohibit bringing of omnibus prayers in one application. Replying the submission, Mr. Faustin Anton Malongo, learned counsel for the applicant conceded that Rule 17 (1) of the Mediation Rules prohibits reference to anything said during mediation proceedings, unless the parties agree in writing. However, the Commission had ruled on the condonation before moving to mediation hence the proceedings and ruling on condonation can be revised by this court as they contained contentious matters. According to Mr. Malongo, the applicant was aggrieved by the ruling on condonation, but was prohibited by the enactment in Rule 50 of the Labour Rules, which restrict disputes related to 4 interlocutory orders which do not resolve labour disputes to the finality. Regarding invitation of section 91 and 94 of the Labour Act, Mr. Malongo submitted that there are precedents of this court in support of the move, namely: Deus Morris Alexander v. Sandvik Mining & Construction (T) Ltd, Revision No. 14 of 2011 and Bulyanhulu Gold Mine Ltd v. Samson Hango & Ten Others, Revision No 44 of 2020. In the opinion of Mr. Malongo, the revision regarding condonation proceedings and ruling could not have brought in this court before completion of the dispute to the finality hence it was brought together with the arbitration award and therefore cannot be said to be out of time. Mr. Malongo submitted further that the law in Rule 28 of the Labour Rules allows revision of any species of labour decisions resolved at the Commission, including revision on condonation at this court. Mr. Malongo had moved further to distinguish the precedent of this court in Fatma Mukangara & Another v. The Attorney General (supra) at three (3) levels, that: first, there is no issue of omnibus application; second, the prayers in the case were determined on merit; third, the decision was resolved in favor of the applicant. Regarding the precedent in Amos David Kassanda v. Commissioner for Lands & Another (supra), Mr. Malongo distinguished it on the following reasons: first, it is not a labour 5 dispute; second, it interpreted section 14 of the Law of

Limitation Act [Cap. 89 R.E. 2019] and Order XLII Rule 2 of the Civil Procedure Code [Cap. 33 R.E. 2019]; and finally, the application mixed up filing of memorandum of review on one hand and chamber summons and affidavit on the other. In a brief rejoinder, Mr. Kisyeri submitted that the indicated authorities in *Deus Morris Alexander v. Sandvik Mining & Construction (T) Ltd* (supra) and *Bulyanhulu Gold Mine Ltd v. Samson Hango & Ten Others* (supra) are distinguished in the sense that in the first precedent the ruling on condonation and arbitration award were both in arbitration proceedings whereas in the second precedent the contest concerned arbitration awards. I have perused the submissions and registered precedents of the learned friends in this application. I have also scanned the provisions of the law in section 91 and 94 of the Labour Act. The precedent in *Fatma Mukangara & Another v. The Attorney General* (supra), this court had received three prayers in one application on enlargement of time, application for leave to appeal to the Court of Appeal and stay of execution. This court finally had resolved that it cannot fall into such a trap and dismissed the application. In the application, there were no conversations on sections 91 and 94 of the Labour Act, but sections 11 of the 6 Appellate Jurisdiction Act [Cap. 141 R.E. 2019] and section 95 of the Civil Procedure Code [Cap. 33 R.E. 2019]. In the decision of *Amos David Kassanda v. Commissioner for Lands & Another* (supra), the applicant had registered in this court multiple prayers which were not related and invited different pieces of legislation, different procedures and different criteria of determination. During submissions for and against a point of objection, several provisions of the law were considered, namely: section 14 (1) of the Law of Limitation; Order XLII Rule 1, 2 and 3 of the Code; and article 107A (2) (e) of the Constitution of the United Republic of Tanzania [Cap. 2 R.E. 2002] (the Constitution). This court then decided that the prayers are not compatible and cannot be lumped together. The contents in the ruling of this court in the precedent had no any materials related to section 91 and 94 of the Labour Act. I visited the decision in *Deus Morris Alexander v. Sandvik Mining & Construction (T) Ltd* (supra). The decision concerns an application for enlargement of time at this court, after refusal of the same by an arbitrator at the Commission. After full hearing of the application, this court at page 8 of the ruling had dismissed the application for want of sufficient reasons. In the precedent, this court was busy resolving the application. However, it decided to 7 take its time off the schedule to produce an obiter dictum at page 6 of the decision. For purpose of clarity of the matter, I will quote the obiter dictum'. ...I fee/ obliged for the benefit of practitioners in this area, to respond by stating the correct legal position, on ground that this court has no powers to revise CMA decision made in an application for condonation because such a decision is a ruling, and not an award. The law is that CMA's decision refusing to grant an application for condonation is revisable on the same grounds as an award under section 91 of the Employment and Labour Relations Act, 6/2004 read together with Rule 28 of the Labour Court Rules. This is because such ruling brings a dispute to the finality. The only CMA rulings which are not subject to revision are interlocutory ones that is, those decisions which do not finally determine rights of parties... a party cannot seek revision of the CMA ruling granting an application for condonation, such an application has to wait until the application on merit is heard, and can then be brought up when seeking revision of such final decision. On the same thinking, the decision in *Bulyanhulu Gold Mine Ltd v. Samson Hango & Ten Others* (supra), at page 12 of the ruling thought that there is no problem in bringing two omnibus applications like the present one via sections 91 (1) and 94 (1)

of 8 the Labour Act and Rule 28 of the Labour Rules. However, the application had considered two (2) proceedings emanated in arbitration awards number CMA/MUS/354/2016 and CMA/SHY/354/2016 as reflected at page 12 of the ruling. The precedent was also determined on 11th December 2020. In its determination at page 8 of the ruling cited and cherished the precedent in *Deus Morris Alexander v. Sandvik Mining & Construction (T) Ltd* (supra). The decision in *Deus Morris Alexander v. Sandvik Mining & Construction (T) Ltd* (supra) was resolved more than ten (10) years ago, and specifically on 20th September 2012. It also produced the indicated obiter dictum, which is a comment or observation made by a judge in an opinion by the way. Obiter dicta are not binding on other judges of this court. They are persuasive statement produced by judges. That is why the two (2) indicated decisions were not followed by this court in the precedent *African Nursery arid Primary School*

- v. Iddi Mtali, Revision No. 287 of 2021 and *Equity Bank (T) Ltd V. Abdulhussein J. Mvungi*, Labour Revision No. 62 of 2019, which had resolved that: unless the condonation is dismissed, where the applicant's right would finally be barred from determination, granting of condonation is nothing but an interlocutory order falling 9 under the prohibition provided for under Rule 50 of the Labour Rules. Noting the variance in thinking of the previous decisions of this court on the subject, on 24th May 2023, the Labour Revision No. 7 of 2022 between *University of Iringa and Dr. Loy Mbwilo*, concerning similar dispute on a ruling granting condonation to the applicant, this court noted, at page 5 of the Ruling, that: there are conflicting decisions of this court on the subject. However, the court had finally dismissed the revision for want of Rule 50 of the Labour Rules. The reasoning of the court is found at page 5 of the ruling that: grant of a condonation is interlocutory, not appealable. It is unfortunate that all the indicated precedents have not resolved a situation where the revision is filed within time, but attached with additional prayer for this court to scrutinize the condonation proceedings and ruling without citation of any law which empowers this court to do so. It is certain and settled law that jurisdiction of courts is a creature of statute (see: *Zephania O. Adina v. GPH Industries Ltd*, Labour Revision No. 27 of 2020). The general principle of law demand that, laws are made to be complied with, especially courts or tribunals must follow the tetter of the law as it is, in order to satisfactorily deliver justice to the disputants (see: *Sunshine Transportation Ltd v. Pendo Chuwa*, io Labour Revision No. 800 of 2018). The law in section 91 (1) of the Labour Act provides for arbitration awards and arbitration proceedings to be contested in this court. The law is silent on condonation proceedings or condonation rulings in favor of the applicants. It is not very clear whether the enactors purposefully avoided the words to escape this court from receiving contests of ruling granting condonation in the Commission or just a mere slip of the texts. Regarding the indicated precedents in this ruling, it is obvious that they did not touch contests like the present one. The precedent in *Deus Morris Alexander v. Sandvik Mining & Construction (T) Ltd* (supra) had resolved a dispute on enlargement of time and went ahead to provide an obiter dictum. However, the decision has declined the procedure of bringing actions in the Commission via Rules 5, 12 & 15 of the Labour Rules and directives of this court in the precedent of *Rui Wang v. Eminence Consulting (T) Ltd*, Labour Revision No. 306 of 2022. On

the other hand, the precedent in Bulyanhulu Gold Mine Ltd v. Samson Hango & Ten Others (supra) had received omnibus prayers in single application, but emanated from the same labour disputes at the Commission in arbitration awards number CMA/MUS/354/2016 and CMA/SHY/354/2016 as reflected at page ii 12 of the ruling, and had resolved that there is no problem. Similarly, the precedents in African Nursery arid Primary School v. Iddi Mtali (supra), Equity Bank (T) Ltd V. Abdulhussein J. Mvungi (supra), University of Iringa v. Dr. Loy Mbwilo (supra), have received revisions from the protests of condonation ruling in labour disputes which were in favor of applicants and before the disputes were resolved to the finality. In brief, the present revision is one of its kind without any enactment of the law in the Labour Act or any other enactments in labour disputes. In my considered opinion, I think, there are three

- (3) stages in bringing and resolving labour disputes in the Commission, namely: first, mediation stage which resolves contentious issues; second, mediation stage which settles parties' differences amicably; and finally, arbitration stage which resolves contentious issues. The enactment in section 91 of the Labour Act has declined the procedure of bringing to this court the first stage of contests in the Commission which are resolved in favor of condonation. It is not known how the record of the first stage can find its way to this court. This court cannot entertain omnibus prayers of the applicant in the present revision for want of specific provision regulating bringing condonation rulings resolved in favor of the applicants in the Commission. 12 In the end I am moved to strike out the instant revision for want of the law regulating omnibus prayers in a single application, section 91 (1) of the Labour Act and Rule 50 of the Labour Rules. I do so without costs as this is a labour dispute. I am aware Mr. Kisyeri had registered several other complaints in this court disputing this revision to move into the merit of the matter. However, after the ruling in the two (2) indicated enactments, this court cannot be busy with other issues. Indulging on the issues will be wastage of time and resources of this court. I cannot support such a move. This Ruling was pronounced in Chambers under the Seal of this court in the presence of the respondent's Personal Representative, Mr. Marwa Chacha Kisyeri, and in the presence of the applicant's learned counsel, Mr. Imani Mfuru, through teleconference attached in this coM * ~ Judge 31.08.2023 13

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Prepared on 14 October 2026 · Esheria