

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

LABOUR REVISION NO. 7 OF 2020

(C/F Labour Dispute No. MOS/CMA/M/233/2011 Commission for Arbitration at Moshi)

DISTRICT EXECUTIVE DIRECTOR

MOSHI DISTRICT COUNCIL APPLICANT

VERSUS

ALFRED MBUYA RESPONDENT


18th February & 19th April, 2021.

RULING

MKAPA, J.

The applicant Alfred Mbuya, aggrieved by the Award of the Commission for Mediation and Arbitration of Moshi (the Commission) in **Labour Dispute No. MOS/CMA/M/233/2011** delivered on 6th March, 2015 by G.P Migire (arbitrator) is seeking this Court to examine the records and proceedings of the Commission for the purposes of satisfying itself as to its legality, propriety and correctness thereafter set aside the said Award.

The application is brought under Rules 24(1), 24(2) (a), (b), (c), (d), (f), 24(3) (a), (b), (c), (d), 28(1) (b) (c), (d) and (e) of the Labour Court Rules, 2007 (Labour Court Rules) and Sections 91




(1)(a), 91(2) (a), (b), (c) and 94(1)(b)(i) of the Employment and Labour Relations Act, (ELRA). No. 6 of 2004, as amended. The application is supported by an affidavit of Mr. Muhsin R. Kilua, learned District Solicitor. The respondent objected and filed a counter affidavit.

It would be useful to note the background leading to this application to the effect that, the respondent was employed as a teacher in 1969 but his employment was terminated by the Teacher's Service Commission Board on the 20th December, 2001 for abscondment.

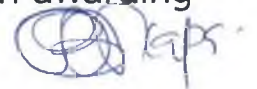
Aggrieved by the decision on 10th October 2011, the Respondent filed a complaint against the applicant at the Commission in **Labour Dispute Ref No. MOS/CMA/M/233/2011**. Before the matter was heard on merit, the applicant raised preliminary objection on points of law among them the fact that, the Commission lacked jurisdiction in dealing with the dispute that was not referred to it by the Labour Commissioner. In addition the respondent did not exhaust all the local remedies available under the **Public Service Act, No. 8 of 2002** since the cause of action arose before the enactment of the ELRA in 2004.

The Commission overruled the objection and proceeded to determine the matter while ignoring the remaining points of preliminary objection. Dissatisfied with Arbitrator's conduct the



applicant wrote a letter to the Commission but the Arbitrator refused to recuse himself and proceeded to determine the matter *ex-parte* against the applicant who was alleged to have been late for 30 minutes on the day when the matter was ordered to proceed *ex-parte*. It is further alleged that when the applicant prayed for the *ex-parte* order to be set aside the Commission declined and in the end decided in favour of the respondent hence this application for revision on the following grounds;

1. That, the Arbitrator failed to judiciously exercise his discretion by refusing to set aside *ex-parte* Award based on irrelevant and extraneous grounds.
2. The Arbitrator acted on material irregularity in exercising jurisdiction which was not vested in him by determining a matter which was not preferred by the Labour Commissioner contrary to section 42 of the Written Laws (Miscellaneous Amendments) (No. 2) No. 11 of 2010.
3. That, the Arbitrator acted on material irregularity by awarding relief to the respondent based on the ELRA instead of substantive laws which were in force during 2001 when the dispute arose.
4. That, the Award was improperly procured as the Arbitrator acted with biasness.
5. That, the Arbitrator acted on material illegality in awarding costs to the respondent.

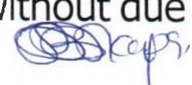


At the hearing of the application the Court ordered parties to argue by way of filing written submissions. The applicant was represented by Mr. Muhsin Kilua, Acting District Solicitor while the respondent appeared in person, unrepresented.

Supporting the application, Mr. Kilua submitted that the Award of the Commission was based on the ELRA instead of the substantive laws which were in force in 2001 when the dispute arose. He added that, the substantive laws which were operational in 2001 included Civil Service Act, 1989 (Act No. 16 of 1989) and Teachers Service Commission Act, 1989 (Act No. 1 of 1989) which were repealed in 2002 by the Public Service Act, 2002 (Act No. 8 of 2002). He referred this Court to section 42 of the Written Laws (Miscellaneous Amendment) (No.2) Act No. 11 of 2010 which reads;

"All disputes originating from the repealed laws shall be determined by the repealed substantive laws applicable immediately before the laws commencement of this Act"

Mr. Kilua went on arguing that the Commission considered extraneous and irrelevant matters which were not canvassed by the parties such as the allegations that it was applicant's habit not to enter appearances while it was not true. Mr. Kilua informed the Court that the Arbitrator awarded costs without due



consideration to the Applicable laws. He finally prayed for the application to be allowed and the Commission's Award be dismissed.

In reply the respondent submitted that he became aware of his termination from employment in 2007 vide a letter dated 22/07/2007. That the said letter stated that although the notice of termination was given to the respondent's headmaster one Godfrey Kabyemera in 2000/2001 the same did not reach him until 2007 when he became aware. In the circumstance the respondent disputed the claim that the dispute with his employer arose in 2000/2001.

He added that at the time the ELRA was enacted and became operational the Act applied to employment disputes from both public and private sector. Thus the Commission did not error in applying the same to reach its decision. To support his argument the respondent cited the decision in the case of **Attorney General V Chama cha Walimu Tanzania (CWT)** Application No. 19 of 2008, High Court of Tanzania Labour Division where the Court held *inter alia* that;

"Where any provision of the law conflicts the Employment and Labour Relations Act, the Employment and Labour Relations Act shall prevail

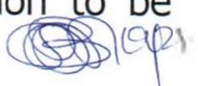


against all other laws as far as Labour matters are concerned."

It was the respondent's contention that Arbitrator's ruling was clear to the effect that the applicant failed to give sound reasons for non-appearance on 06/03/2015 when the matter was scheduled for hearing. That, although the applicant's counsel claimed that she attended another matter at the District Land and Housing Tribunal of Moshi (DLHT) in **Land Case No. 26/2014**, she failed to prove the same.

The respondent informed the Court that, section 88 of the ELRA empowers an arbitrator to make an order for costs where he finds that a person representing a party acted in a frivolous or vexatious manner. He averred that the Commission's proceedings demonstrated how the applicant had been acting in such manner which warranted the arbitrator to order costs.

The respondent further argued that for this Court to set aside the Commission's Award as prayed by the applicant, the applicant ought to have shown misconduct on the part of the Arbitrator as contained in section 91 (2) (a) and (b) of ELRA. However, the applicant failed to show how the Award was improperly procured. The respondent finally submitted that the application lacks merit and prayed for the application to be dismissed with cost.



In rejoinder Mr. Kilua reiterated his stance in submission in chief and maintained the fact that the Law cannot act retrospective since the dispute arose in 2001 thus the Commission erred in determining the dispute by applying the ELRA which was enacted in 2004. He thus prayed for this Court to set aside the Ex-parte Arbitral Award.

Having considered Commissions' records and parties submissions it is undisputed that, the impugned Award which is sought to be revised was issued *ex-parte*. It is well settled that a party aggrieved by an ex-parte decision has to apply for setting aside of the said descision. In the instant matter the applicant had to apply to the Commission giving reasons for non-appearance while seeking the Award to be set aside.

Considering the manner in which I intend to deal with the matter at hand I find it necessary to address the following issues:

- (i) Whether the applicant had reasonable causes for her non-appearance leading to the dispute be adjudicated *ex-parte*.
- (ii) Whether the Arbitrator acted judiciously in denying to set aside the *ex-parte* orders.

As per the applicant's submission the reason which made the Arbitrator to deny applicant's prayer to set aside the Ex-parte Award is perpetual applicant's non-appearance at

Commission's hearing. However, on perusal of the Commission's records of proceedings it has been revealed that from 26th October, 2011 when the matter was called for hearing, the applicant defaulted appearance twice at the very beginning of the trial on November 2011. Thereafter, the matter was adjourned more than twenty times in which the applicant was always present until on 16th December, 2014 when the Commission ordered the matter to proceed *ex-parte*.

In her defence, the counsel for the applicant claimed that, on the day when the matter was scheduled for hearing she was attending another matter at the DLHT **in Land Case No. 26/2014** which she expected to have ended early. The Commission found the counsel's reason not to be a sufficient cause thus prayer to set aside *ex-parte* order was not allowed. The Commission's records of proceeding further revealed that, on 7th March 2012 a hearing was scheduled for respondent's application for extension of time in which the respondent had defaulted appearance as evident at page 3 of the Commission's typed proceedings whereby the Arbitrator made the following remarks;

"COMMISSION: *The case for hearing of application for condonation. Due to absence of applicant, hearing postponed until 21/03/2012 at 10:00 a.m. Applicant*



to make follow-ups as further absence may lead to the case be dismissed."

Just as the Arbitrator was in position to dismiss the application for non-appearance of the respondent herein the arbitrator did not maintain his stance when similar scenario happened to the respondent. Prudency demands and justice dictates that the same reasoning should have applied to the respondent in order to eliminate biasness and for justice to be met. In **Porter and Another V Magill** [2002] I All ER465, a test for biasness was set;

*"The test for apparent bias is whether the alleged circumstances would lead **a fair minded and informed observer to conclude that there was a real possibility that the Court was biased.**"*
[Emphasis supplied]

In my view the instant matter is an ideal case in which the above test can be applied. Although section 88 (8) (b) of the ELRA and Rule 28 of Labour Court Rules give discretion to the Commission to proceed hearing the matter *ex-parte* once the respondent defaulted appearance at the hearing, such discretion in my considered view ought to have been exercised judiciously by the Commission since it had earlier decided differently in similar circumstances. More so, courts including quasi- judicial bodies



(including the Commission) are always urged to consider substantive justice rather than technicalities. In the case of **Cropper V Smith** (1884) 26 CH D 700 (CA) p. 710 it was held that:

"It is well established principle that the object of the court is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their rights. I know of one kind of error or mistake which if not fraudulent or intended to overreach, the court ought to correct if it can be done without injustice to the other part. Court does not exist for the sake of disciplines but for the sake of deciding matter in controversy."

The same position was underscored in the case of **General Market Co. Ltd V A.A. Shariff** [1980] TLR 61, where the Court emphasized that rules of procedures should not be used to defeat justice.

Having regard to the facts and circumstances of the case I am of the considered view that the Commission did not act judiciously in arriving at its *ex-parte* decision which undoubtedly did prejudice the applicant.

Consequently, the Commission's *ex-parte* proceedings and the Exparte Award dated 6th March, 2015 are hereby quashed and

set aside. I further order the application to be heard *inter-parties* on merit before another Arbitrator.

Dated and Delivered at Moshi this 19th day of April, 2021



A handwritten signature in blue ink, appearing to read "S. B. Mkapa", is written over the printed name.

S. B. MKAPA

Judge

19/04/2021