IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA
(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 362 OF 2019

SWILLA SECONDARY SCHOOL..... APPELLANT

VERSUS

JAPHET PETRO.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Mongella, J.)

Dated the 18th day of July, 2019

in

Labour Revision No. 42 of 2017

.....

JUDGMENT OF THE COURT

12th February & 30th April,2021

LILA, JA:

The respondent, Japhet Petro, rendered his services with the appellant, Swilla Secondary School, as a teacher on a fixed term contract of three years. However, before lapse of such term, his service was terminated on 11th November 2015 on allegation of absenteeism. The termination aggrieved him. He referred the matter to the Commission for Mediation and Arbitration (the CMA).

The appellant defaulted to enter appearance during the hearing of the dispute consequent upon which the CMA proceeded ex parte. At its conclusion of the hearing on 1st March 2016, the CMA issued an ex-parte award. It was its finding that the respondent was unfairly terminated and awarded him severance allowance of TZS 201,923.00, payment in lieu of notice TZS 807,692.00, compensation of twenty month's remuneration TZS 15,000,000.00, general damages TZS 2,000,000.00, salary arrears TZS 750,000.00, gratuity TZS 4,050,000.00, leave allowance TZS 807,692.00. In sum the appellant was ordered to pay TZS 23,617,307 to the respondent.

Uncomfortable with the award, the appellant sought to challenge it. It being an ex-parte award, the appellant on 14th March 2016, lodged an application to set it aside. The efforts were, however, thwarted, for on 25th May 2016, the CMA struck out the application for being incompetent on account of not being supported by an affidavit. The Appellant did not succumb. On 8th June, 2016 she lodged yet another application praying to set aside the ex-parte award. Despite the respondent raising an objection to the effect that it was time barred, on 21st October 2016 the application

was granted. The ex-parte award was thereby set aside. The arbitrator, thereafter, entertained the dispute and was satisfied that termination was fair both substantively and procedurally and found for the appellant. The respondent's claims were accordingly dismissed.

The CMA's decision aggrieved the respondent. He sought for revision at the High Court Labour Division. The High Court quashed the decision issued on 25th May 2016 by the CMA which set aside the ex-parte award, nullified the award issued on 22/6/2016, and restored the ex-parte award dated 1st March 2016 for a reason that the application for setting aside the ex-parte award was time barred. The learned judge, however, went further to examine the award and granted the respondent twelve (12) month's remuneration amounting to TZS 9,000,000.00, a November 2015 salary of TZS 750,000.00 and leave pay in the sum of TZS 700,000.00. She dismissed the claims for general damages, severance pay and gratuity. In total, she awarded payment of TZS 11,200,000.00 to the respondent.

The modification of the award in her favour notwithstanding, the appellant was still not satisfied, hence the present appeal. She now seeks to challenge the High Court decision on these complaints: -

1. *The High Court erred in law and fact in holding that the appellant did not attend mediation and Arbitration despite being served with summons*
2. *The High Court erred in law in upholding the ex-parte award of the Commission for Mediation and Arbitration issued by the mediator.*
3. *That the High Court erred in law and fact in holding that the respondent was unfairly terminated on procedural ground.*
4. *The High Court erred in law and fact in holding that the respondent was entitled to annual leave payment.*

Before us for hearing of the appeal, the appellant was represented by Mr. Benedict Sahwi, learned counsel, whereas the respondent appeared in person and was unrepresented. Both parties had filed submissions and they fully adopted them and made some oral submissions to elaborate them. However, for a reason to be apparent shortly, we shall not delve to recite the submissions in full. Instead, we shall only refer to only those parts of the submissions relevant to the issue on which the decision is grounded.

As our starting point, we wish to point out that it was not in controversy both in the parties' respective written and oral submissions that the first application to set aside an ex-parte award which was filed within time was struck out for being incompetent. That, then the second similar application was filed on 8/6/2016. Mr Sahwi was not hesitant to concede that it was timed barred as it was made after the lapse of almost 100 days after the award was granted on 01/03/2016. For that reason, he admitted, and rightly so in our view, that the High Court was correct in its finding and the consequential order of quashing the second award and restoration of the *ex-parte* award.

At that stage, the Court, *suo motu*, was troubled whether the learned judge was justified to go further and examine the ex-parte award and vary it as she did. Accordingly, the parties were invited to address the Court on that issue.

Mr. Sahwi was first to respond to our query. Without much ado, he readily conceded that the learned judge strayed into an error when she examined the content and validity of the ex-parte award and varied it. He argued that it was not an issue before her. While referring to page 137 of

the record of appeal (page 2 of the typed judgment), he said that the issues for discussion were two; whether the termination of employment contract was fair substantively and procedurally and to what reliefs were the parties entitled to. Neither party had challenged the ex-parte award before the High Court, he insisted. Looking rather confidently, he argued that since the revision before the High Court emanated from the second award and the application to set aside the ex-parte award having been found time barred and annulled, the High Court ought to have had ended there and left it for an aggrieved party to challenge the ex-parte award through a proper forum and procedure. He concluded by imploring the Court to invoke its revisional powers under section 4(2) of the AJA and quash the High Court decision varying the ex-parte award.

Addressing the Court on the issue raised by the Court, the respondent, for obvious reasons that he is not learned on law, adopted the written submission he had earlier on filed and argued that the learned judge was right to declare the second award invalid because the application to set aside the ex-parte award was time barred.

As our take off, we shall, first consider whether the learned judge was proper in her finding that the second application for setting aside the ex-parte award was time barred. Fortunately, it is common ground that the judge was right. We entirely agree with the parties. We have already shown that the *ex parte* award was issued on 1/3/2016 in which the CMA ordered the appellant to pay the respondent TZS 23,617,307.00. The first application to set aside an ex-parte award was lodged on 14/3/2016 but the same was struck out on 25/5/2016 for being incompetent. The appellant successfully lodged another application to set aside the ex-parte award on 8/6/2016 which was almost 100 days after the ex-parte award was issued. Nonetheless, the CMA entertained the application, granted the application on 25/5/2016 and set aside the ex-parte award. Subsequently, the CMA heard the dispute and on 22/6/2016 found the respondent's claims unfounded and dismissed the same. Applying her mind on these facts, the learned judge, at page 249 of the record of appeal concluded that: -

> *"...In my view, I find the decision of the mediator setting aside the ex-parte award was incorrect.* ***The second application was filed***

> ***after the lapse of more than sixty days from the date the ex-parte award was issued.*** *Therefore the respondent was required to first apply for extension of time to file the application...having observed as such I quash the CMA decision issued on 25/5/2016 setting aside the ex-parte award. Having quashed this decision, the award issued on 22/6/2016 is automatically nullified because it lacks the base to stand on as there is already an ex-parte decision issued by the mediator."* [Emphasis added]

With all due respect to the learned judge, the foregoing finding is partly incorrect and partly correct. The finding suggests that the time limit for lodging an application for setting aside an award is sixty days. She did not cite any law to that effect as opposed to the respondent who had raised a preliminary objection in that respect and cited Rule 31(1) of GN No. 64 of 2007 which, according to him, enjoined the appellant to lodge the application to set aside within fourteen (14) days from the date the ex-parte award was issued.

To us, we entertain no doubt that the relevant law governing time limit of lodging an application for setting aside the ex-parte award is Rule 30(1) of the Labour Institution (Mediation and Arbitration Guidelines) G.N. No. 64 of 2007 (henceforth GN. No. 64 of 2007) which requires an application to set aside an award to be made within fourteen (14) days from the date he became aware of the award sought to be set aside. That Rule categorically states: -

> *"30-(1)* ***An application by a party to correct or set aside an arbitral award*** *in terms of section 90 of the Employment and Labour Relations Act* ***shall be made within fourteen days from the date on which the applicant became aware of the arbitration award."***
> (Emphasis added)

With the above exposition of the law, it was therefore incorrect for the learned judge to peg the time limit on sixty days.

The foregoing notwithstanding, we agree with the learned judge that the second application to set aside the ex-parte award was time barred. It was to be filed within fourteen (14) days reckoned from the date when the appellants became aware of the ex-parte award. It is common ground that

the appellant's first application to set aside the ex-parte award was filed on 14/3/2016 but was struck out on 25/5/2016. That means the respondents were aware of the ex-parte award right from when they lodged the first application to set aside. It is obvious that the application lodged on 8/6/2016 was filed outside the fourteen (14) days period prescribed under Rule 30(1) of GN No. 64 of 2007. It was late. In the circumstances, the proper course to be taken by the appellants, as rightly directed by the learned judge, was to seek and obtain an order for extension of time before lodging such an application. Unfortunately, and as conceded by Mr. Sahwi, that was not done. The law is settled that the issue of jurisdiction for any court is basic as it goes to the very root of the authority of the court or tribunal to adjudicate upon cases or disputes. Courts or tribunals are enjoined not to entertain any matter which is time barred and in any event they did so, the Court unsparingly declared the proceedings and the consequential orders a nullity. In, for instance, **John Barnabas vs Hadija Shomari**, Civil Appeal No. 195 of 2013 (unreported) the Court pronounced itself thus: -

"Consequently, in line with what we have endeavoured to traverse above, we hold that

> ***the Ward Tribunal of Kinyangiri, lacked jurisdiction to entertain the land dispute which was lodged by the respondent because it was time barred.*** *As a result, the proceedings before the Ward Tribunal and those subsequent thereto, were nullity and we nullify them." [Emphasis added]*

The Court restated the afore stated legal position recently in **Barcklays Bank (T) LTD vs Jacob Muro**, Civil Appeal No. 357 of 2019 (unreported) where it stated that: -

> *"In the final analysis, we allow the appeal.* ***Since the CMA acted without jurisdiction as the referral was time-barred, we nullify its proceedings as well as its award.*** *The same fate befalls upon the proceedings in the High Court, Labour Division as well as the decision thereon as they stemmed from a nullity." [Emphasis added]*

[See also **Mayira B. Mayira and Four Others vs Kapunga Rice Project**, Civil appeal No. 359 of 2019 and **The D.P.P. vs Bernard Mpangala and Two Others**, Criminal Appeal No. 28 of 2001 (both unreported)

Since, in the present case, the second application for setting aside the ex-parte award was time barred, the CMA lacked jurisdiction to entertain it. The proceedings before it and the order setting aside the ex-parte award were therefore a nullity. The ex-parte award therefore remained unchallenged, hence intact as the learned judge rightly and firmly held.

Now reverting to the point of our concern, the crucial question becomes; was the learned judge then justified to examine and vary the terms in the ex-parte award? We should hasten to point out that she was not. At least two reasons would suffice to justify our position. **One**; after making a finding that the second application for setting aside the ex-parte award was time barred, the learned judge ought to have allowed the revision and nullified both the proceedings and the order of the CMA setting aside the ex-parte award. That would have been the end of the matter. **Two**; Both the record of appeal and the learned judge's judgment were very particular on the grounds upon which the revision application was premised by the respondent. These, as reflected on pages 240 and 241 of the record of appeal (page 2 and 3 of the judgment), were: -

"1. This Hon. Court be pleased to call for the records in the Labour dispute with Reference No. CMA/MBY/141/2015;

2. Upon calling for the records, this Hon. Court examines and revises the records, proceedings and **award dated 22/6/2017 and satisfy itself as to the correctness, regularity and propriety of the said CMA award**; and

3. That this Hon. Court **be pleased to set aside the CMA Award** and issue new decision, direction, orders or any other reliefs that may deem fit and just to grant."

It seems clear to us that, in the application for revision, the respondent had intended to ask the High Court to consider the propriety and correctness of the award dated 22/6/2017 (the second award). His major contention was that the ex-parte award was set aside by the mediator who had wrongly entertained an application to that effect which was time barred. From the grounds of the revision application recited above, there is nothing suggesting or rather implying that the validity of the ex-parte award was in any way being questioned. Worse still, the appellant had not applied for revision of it. In all, the revision application

did not, in any respect, address the validity or otherwise of the ex-parte award, and for that matter, its consideration and variation of the terms that obtained in it was improper. Settled law is to the effect that parties are bound by their pleadings. Similarly, courts have to hear and determine disputes based on the pleadings. As an insistence for the courts to adhere and decide cases basing on the parties' pleadings, we wish to seek inspiration and borrow a leaf from the case of **Lever Brothers Ltd v Bell** (1931) 1 KB 557 at page 583 cited in **Anthony Ngoo and Another vs Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported) in which Scrutton L J, stated that: -

> *"**The practice of the courts is to consider and deal with legal result of pieaded facts**, although the particular legal result alleged is not stated in the pleading."*
> [Emphasis added]

Equally important and by analogy, appeals and revisions must be decided on the grounds raised and if a party desires to raise or add other grounds, he must place them before the court. In the present case the validity of the ex-parte award was not at issue as it was not raised as a

ground of revision. The learned judge should not have taken the course of considering it and varying it.

It is apparent that the issues the learned judge formulated to act as a rider in her determination of the revision application, manifestly, boomeranged, for they bore unexpected outcome because they misled her for involving consideration of the validity of the ex-parte award. The said issues as reflected at Pages 248 and 249 of the record of appeal (page 10) of the judgment were: -

> *"1. Whether it was proper for the CMA to entertain an application made out of time by the respondent to set aside the ex-parte award.*
>
> *2. Whether it was correct for the Mediator to issue an award upon deciding the matter.*
>
> *3. Whether there was unfair termination.*
>
> *4.* ***Whether the reliefs granted were justified and correct****." [Emphasis added]*

We are mindful of the fact that the revision application before the judge was initiated by the respondent whose claims were dismissed by the CMA. Looking at the issues raised, we think that it escaped the mind of the

learned judge that before her there were therefore no reliefs granted worth her consideration. She consequently ended up falling into the trap of erroneously discussing the validity of the ex-parte award which was not at issue.

It is clear, then, from the above set of facts that the learned judge strayed into error when she considered the validity of ex-parte award which was not an issue before her.

For avoidance of doubts, the appellant's second application for setting aside the ex-parte award was time barred. The proceedings before the CMA and the order by it setting aside the ex-parte award as well the proceedings of the High Court and the order varying or altering the ex-parte award are a nullity. The ex-parte award, in the circumstances, remains so far unchallenged.

Without discussing the other grounds of grievance fronted by the appellant in the memorandum of appeal, we are satisfied that the above considerations are sufficient to dispose of the appeal.

We are constrained, in the end, to go along with Mr. Sahwi's proposal that we should invoke our powers of revision so as to correct the apparent

error on the face of the record. Accordingly, invoking our powers under section 4(2) of AJA, we hereby quash and nullify the proceedings of the CMA setting aside the ex-parte award and those of the High Court varying the reliefs granted by the CMA in the ex-parte award and we also set aside the grant of a total sum of TZS 11,200,000.00 as an award to the respondent by the High Court. We make no order for costs.

DATED at **DAR ES SALAAM** this 14th day of April, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered on this 30th day April, 2021, via video conference from Mbeya in the presence of Mr. Benedict Sahwi, learned counsel appeared for the appellant and Respondent present in person is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL