

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
LABOUR DIVISION  
AT ARUSHA**

**LABOUR REVISION NO. 45 OF 2022**

**WARRIOR SECURITY (T) LTD ..... APPLICANT**

**VERSUS**

**ALEX LOMAYAN LAIZER ..... 1<sup>ST</sup> RESPONDENT**

**EDWARD PETER LEKASI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

21<sup>st</sup> September & 23<sup>rd</sup> November, 2023

**KAMUZORA, J.**

This is an application for revision brought under the provisions of sections 91(l)(a)(b), (2)(b), 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 Cap 366 R.E 2019 (ELRA) and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), 24(11)(c)(d) (e) and 28(1)(c)(d) (e), of the Labour Court Rules GN No. 106 of 2007. The applicant is challenging the award issued by the Commission for Mediation and Arbitrator (CMA) at Arusha in dispute No. CMA/DSM/ILA/203/123/19 on nine grounds. However, in his written submission in support of application the applicants abandoned some of the grounds and

introduced one new ground and for purpose of clarity, I hereby reproduce the said argued grounds: -

- 1) That the Honorable Mediator erred in law and fact to grant condonation to the Respondent whereas the Respondent did not provide sufficient reasons for their delay to refer their dispute for more than 1 year and 9 months.*
- 2) That, in the light of the recent Court of Appeal decision, the Mediator did not have the jurisdiction to hear and determine the application for condonation.*
- 3) That, the Arbitrator erred in law and fact by passing award in favour of the Respondent by basing his decision wholly on the Criminal Case decision and totally ignoring the evidence which was tendered by the Applicant to substantiate its reason for terminating the Respondents.*
- 4) The honourable Chairman erred in law and fact by disregarding the Applicant's evidence which proved that a disciplinary hearing had been conducted prior to the Respondents termination.*

The application was argued by way of written submissions and as a matter of legal representation, Mr. Nyinga Joseph, learned advocate appeared for the applicant while Mr. Edwin Silayo, learned advocate appeared for the respondent.

The Applicant started his submission with the 2<sup>nd</sup> ground that, in view of the recent decision of the court of appeal the mediator had no adjudication powers hence could not grant condonation. The respondent

faulted the applicant for bringing this matter as new ground which was not raised as ground for revision and indeed, it is a new ground.

I agree with the respondent's counsel that parties should not be allowed to argue matters not presented before the court. To allow such practice is likely to cause injustice to other part if not accorded chance to address the matter. I however agree with the Applicant's counsel that, this matter falls under jurisdiction issue because the jurisdiction of the mediator in granting condonation touches the jurisdiction of the CMA in determining dispute which its time was extended by the mediator whose jurisdiction is questioned. It is a settled principle of law that point on jurisdiction can be raised at any stage of the proceedings. Procedurally, before addressing any issue, it is important that the same be brought in the court's attention in the presence of the other part so that parties may be accorded right to address it, and is what we call fair hearing.

In this matter, the issue on jurisdiction of the mediator in granting condonation was raised in applicant's submission in support of application. Although the respondent challenged the procedure used by the appellant in addressing the issue, he still argued that issue in the reply submission. Since the respondent had chance to address that issue and had ample time to research before responding as the same was

argued by way of written submission, this court is satisfied that both parties had equally chance in defending their positions. Since the issue raises matter of jurisdiction, this court find it reasonable to deliberate on it.

The applicant claimed that, the mediator, Hon. Kefa P. E who determined and granted the Respondent application for condonation acted on powers which he did not possess. The Applicant cited the case of **Barclays Bank T Limited Vs. Ayyam Matesa**, Civil Appeal No 481 of 2020 CAT (Unreported), **Benjamin Lazaro Isseme Vs. Yapi Merkezi Insaat Anonm Sirket**, Labour Revision No. 26/2023 (Unreported) and **Lucas Abel Bumela and another Vs. CRC Group KNY Desert Eagle Hotel**, Labour Revision No 41/2023.

The Respondent's counsel submitted that, after the complaint was filed, Hon. Kefa, the mediator determined the issue of condonation but did not determine the complaint. To him, it has been a practise for the mediator to determine condonation which is usually annexed to the complaint form, CMA Form 1 before engaging into mediation process. He added that there are conflicting decisions on the power of the mediator to determine an application for condonation. He referred cases cited by

the applicant and the case of **Rui Wang Vs. Eminance Consulting (T) Ltd**, Revision Application No 306 of 2022.

In rejoinder, the applicant acknowledged that there are conflicting decisions of the high court. He however claimed that the variance was settled by the court of appeal in **Barclays Bank T Limited Vs. Ayyam Matesa**, Civil Appeal No 481 of 2020 CAT. That, the court clearly elaborated the powers of mediator in which it was insisted that the mediator does not have mandate to determine any point of law including an application for condonation. He insisted that, in considering the principle of stare decisis, this court be bound by the decision of the court of appeal. He thus prayed for this court to revise and set aside the decision of the CMA.

I have considered the rival arguments by counsel for the parties for and against the application. The law is very clear that all labour disputes filed at CMA must be mediated prior going to the arbitration stage. There is no doubt that in the application at hand, the condonation order was issued by a mediator during mediation process. The issue is whether the same is fatal or not.

Powers of mediator are found under section 86 of the Employment and Labour Relations Act [cap. 366 R.E. 2019]. The said section provides: -

*"86(3) On receipt of the referral made under subsection (1) the Commission shall –*

*(a) appoint a mediator to mediate the dispute;*

*(b) decide the time, date and place of the mediation hearing;*

*(c) advise the parties to the dispute of the details stipulated in paragraphs (a) and (b)."*

The above provision is clear that, once the dispute is referred before the Commission for Mediation and Arbitration, it must first be mediated by the mediator appointed under subsection (3) (a) of section 86 above. Under paragraph (b) and (c) of subsection 3 above, provides for the duties of a mediator in the mediation process. There is no any other provision which allow the mediator to perform other duty than mediation duty. Basically, mediating disputes does not include adjudication on legal issues. For that reason, condonation does not fall within powers of the mediator whose main duty is to assist parties to settle the dispute. Mediation is centred on mutual trust and confidence between parties and the mediator. See Rule 8(1), (2), (3) and (4) of the Labour Institutions which provides that,

*"8(1) Without prejudice **mediation is a confidential process aimed helping the parties to a dispute to reach an agreement.***

*(2) Information disclosed during mediation may not be used as evidence in any other proceedings unless the party disclosing that information states otherwise.*

*(3) The mediator may not be compelled to be a witness in any other proceedings in respect of what happened during the mediation(sic).*

*(4) **The confidential nature of mediation proceedings prevents the Mediator, the parties and their representatives from disclosing any information obtained during mediation to any third party.***"Emphasis provided

Taking into consideration the above provision, I am the considered view that since mediation is based on trust and it is not expected for the party who opposes condonation to have confidence in the same mediator who allowed the application for condonation. The Court of Appeal in **Barclays Bank T Limited Vs. Ayyam Matesa**, Civil Appeal No 481 of 2020 CAT had this to say;

*"... under the provisions of section 86 and 87 of the ELRA, the role of a mediator is, as rightly submitted for the appellant, to assist the parties to reach amicable settlement of the dispute. In view of his role, the mediator is in a position to receive factual information from the parties that would not ordinarily be made available in the arbitration phase. Besides, the mediation process*

*may involve self- evaluation of weaknesses in the merits of the case which no doubt may be highly influential to a mediator who subsequently assume the role of an arbitrator.”*

It is my firm stand that, in an application for condonation where the applicant seeks for CMA to extend the time frame within which to hear and adjudicate the complaint made by the applicant out of the prescribed legal time, the grant or refusal of such application fall under adjudication or arbitration process and not mediation process. In other words, condonation goes to the jurisdiction of the CMA to adjudicate the matter before it. In that regard, it is something that cannot be regarded as part of mediation process. Even in normal civil suits, the trial judge or magistrate is bound to deal with all preliminaries including determining jurisdictional issues, applications and all interrogatories before forwarding the matter for mediation. It is therefore my settled view that, the mediator acted beyond jurisdiction in granting condonation in this matter.

In concluding, this court is of the settled mind that, the mediator committed a fatal irregularity which rendered all the proceedings subsequent to the grant of condonation a nullity. The adjudication of the substantive dispute premised on the nullity order for condonation is also




irregular and cannot stand. Having found merit in this ground, I find unworthy to determine the remaining grounds for revision.

From the foregoing, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom and remit the file to CMA so that the application for condonation can be heard before an arbitrator. Application is therefore allowed but no order for costs is made since this application emanates from labour dispute.

**DATED** at **ARUSHA** this 23<sup>rd</sup> November, 2023.



  
**D.C. KAMUZORA**  
**JUDGE**

