

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB - REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**LABOUR REVISION NO. 32 OF 2021**

**YUSUPH DANIEL POLI.....APPLICANT**

**VERSUS**

**PANGEA MINERALS LIMITED.....RESPONDENT**

**[Application from the decision of the Commission for Mediation and Arbitration for Shinyanga at Shinyanga.]**

**(Hon. V. Wambali.)**

**dated the 15<sup>th</sup> day of May, 2021**

**in**

**CMA/SHY/90/2018**

**JUDGMENT**

*14<sup>th</sup> June & 24<sup>th</sup> November, 2023.*

**S.M. KULITA, J.**

This is Labour Application filed by the Applicant herein by way of Chamber Summons and Notice of Application, in terms of the provisions of sections 91(1)(a)(b), (2)(a)(b) and section 94(1)(b)(i) of the Employment and Labour Relations Act, 2004 (Act No. 6 of 2004) (as

amended) and Rule 28(1)(c) and (d) of the Labour Court Rules, 2007, G.N. No. 106 of 2007.

In the chamber summons, the Applicant prays for this Court to revise and set aside the decision of the Commission for Mediation and Arbitration (CMA) for Shinyanga in the dispute No. CMA/SHY/90/2018 delivered by Honorable V. Wambali on 15<sup>th</sup> May, 2021. The application is supported with an affidavit sworn by the applicant on the 3<sup>rd</sup> day of September, 2021.

In brief, facts of the case, as can be gathered from the applicant's affidavit, provide that, the applicant had been employed by the respondent on 22<sup>nd</sup> October, 2016 as a Hauling Equipment Operator. The record shows that, on 31<sup>st</sup> December, 2017 the applicant had been terminated by the respondent on redundancy bases. The applicant claims that, he became aware of the said termination on 25<sup>th</sup> January, 2018, after he had been served with the termination letter. Dissatisfied with it, the applicant filed condonation application at CMA vide CMA/SHY/90/2018. On 15<sup>th</sup> May, 2018 his application for condonation got dismissed for want of prosecution.

The applicant got aggrieved, here now challenges the said dismissal order on two grounds, **one**, whether the Mediator was correct

to dismiss the condonation under Rule 29(11) of the Labour Institution (Mediation and Arbitration) Rules 2007 GN. No. 64 of 2007, **two**, whether the Mediator was correct to dismiss the condonation before the applicant was served with the respondent's counter affidavit.

On 25<sup>th</sup> April, 2022 the matter was scheduled for hearing through written submissions. Mr. Bakari Chubwa Muheza, Advocate represented the applicant whereas Mr. Faustine Malongo, Advocate represented the respondent.

Submitting in support of the first ground Mr. Chubwa was of the view that, Rule 29(11) of the Labour Institution (Mediation and Arbitration) Rules 2007, GN. No. 64 of 2007 does not deal with dismissing the application for want of prosecution. On that stand, he was of views that, the Mediator wronged in relying on the cited rule to dismiss the application on the ground of want of prosecution.

On the last ground, Mr. Chubwa complained that, the act of the Mediator fixing the case for hearing before counter affidavit and its reply being filed was wrong. To him, this was contrary to rule 29(2) to (7) of GN No. 64 of 2007. With this scenario, Mr. Chubwa condemned the Mediator to have got prepared himself for dismissing the said application.

Further, Mr. Chubwa complained on the act of the Mediator to dismiss the applicant's application relying on the incidences of the past dates when the applicant had failed to appear before the Commission. Mr. Chubwa was of the views that, the Commission was *functus officio*, thus the Mediator had no jurisdiction to rely upon them.

In reply Mr. Malongo stated that, the Mediator was right to rely on Rule 29 of GN No. 64 of 2007 in dismissing the applicant's application for want of prosecution. He amplified further that, Rule 29 deals with condonation applications. He added that, Rule 29(11) gives powers to the Commission to determine the applications in a manner it deems proper. Insisting his standing point Mr. Malongo stated that, under part VII where Rule 29 emanates, there is no any other specific rule that governs dismissal of a case when the applicant does not appear on the hearing date than the said Rule 29(11). Mr. Malongo argued that if Rule 29 is not the one, the Applicant's Counsel would have cited the alternative provision of which he believes to be proper. He said that, as the Counsel failed to do so in his submission, it means Rule 29(11) is the right provision for that purpose.

On the issue of the Mediator becoming *functus officio* to dismiss the matter relying on the none appearance of the applicant while in the

same scenarios he used to make orders of adjournments, Mr. Malongo stated that, this is new issue which is not featured in the applicant's pleadings, he thus prayed for this court to ignore the same. To cement his argument, he cited the case of **NBC Limited and Another V. Bruno Vitus Swalo, Civil Appeal No. 331 of 2019, CAT at Mbeya.**

As for the issue of fixing the matter for hearing without showing whether counter affidavit and its reply had been filed, Mr. Malongo was of the views that, this argument is meritless. He gave reasons that, the said Rule 29(9) does not make requirement that hearing should be fixed only when the counter affidavit has been filed to court. He added that, as the applicant collected summons for hearing, issued on 7<sup>th</sup> May, 2018, it means he had a knowledge of the hearing date which was 15<sup>th</sup> May, 2018. On such, Mr. Malongo stated that, there is no law that allows the applicant who is aware of hearing date not to appear to the Commission because he has not been served with the copy of counter affidavit. Wisely, he said that, the applicant having been served with the summons to appear, he ought to have turned up to court and his complain on not being served could be raised while in court.

I have keenly gone through the entire pleadings, submissions and the authorities cited by both parties to the case. I have also taken into consideration on the rival issues between the parties.

From the records, it is not in dispute that, the applicant's application was dismissed for want of prosecution on 15<sup>th</sup> May, 2018. Equally, it is not in dispute that, the applicant had the knowledge of the date that had been fixed for hearing of his condonation application which was 15<sup>th</sup> May, 2018. Further, it is not in dispute that, though the applicant knew the date that his application was fixed for hearing yet, he did not appear before the Commission.

As both parties agree, I equally agree that, condonation applications are governed by the Rules found in **Part VII of GN. 64 of 2007**. However, **Rule 29(9) of the cited GN 64 of 2007** does not require the Mediator to fix a hearing date only after the Complainant (Applicant herein) has been served with the copy of counter affidavit. He can do so even when only the affidavit has been delivered/filed to CMA and the copy served to the Respondent. **Rule 29(9) of the Labour Institution (Mediation and Arbitration) Rules 2007, GN. No. 64 of 2007** provides;

*"the commission shall allocate a date for hearing of the application once an affidavit has been delivered or time limit for the delivering a counter affidavit has lapsed, whichever occurs first"*

With this cited rule in existence, the Mediator should not be blamed for fixing the hearing date before the applicant has been served with the copy of counter affidavit. As wisely stated by Mr. Malongo, the applicant would not choose not to appear to the Commission for such reason of not being served with the copy of Counter Affidavit. It would be wise for the applicant to enter appearance and pray to be served.

Concerning **Rule 29(11)** that the Mediator had used in dismissing the applicant's application for condonation, for want of prosecution, it is true that, in his submissions the applicant himself did not suggest any rule as specific for dismissing the applications for want of prosecution. But the wordings of **Rule 29(11) of GN No. 64 of 2007** provides as follows;

*"Notwithstanding this rule, the commission may determine an application in any manner it deems proper"*

Despite the wordings of the above quoted rule, in connection with the prevailing situation that, the applicant, though he had the

knowledge of the date fixed for hearing his application for condonation, yet he chose not to appear. **Part VII of GN. No. 63 of 2007**, which applies for applications does not provide for a specific rule that governs dismissal of the application on the ground of want of prosecution. That being the case, this court chooses to agree with the submission of the Counsel for the respondent that, **Rule 29(11)** fits in, as it has been so used by the Mediator in dismissing the application for condonation. As the applicant failed to cite the alternative rule applicable on the dismissal for want of prosecution, if **Rule 29(11)** does not come into play, then what the applicant herein is doing is nothing but unnecessary delay of justice, and I don't hesitate to regard it a chaos.

Concerning the issue of *functus officio* for the Mediator in dismissing the applicant's application relying on the dates that the applicant had not entered appearance a way back, it is truly, as submitted by Mr. Malongo, that the same had never been raised in the applicant's affidavit but in the Applicant's Counsel came to raise it during the submissions. Introducing new issues during hearing, is taking the respondent by surprise. That act violates the requirement of the law that, parties are bound and should adhere to their pleadings. See **YARA TANZANIA LIMITED V. IKUWO GENERAL ENTERPRISES LIMITED, Civil Appeal No. 309 of 2019, CAT at DSM.**



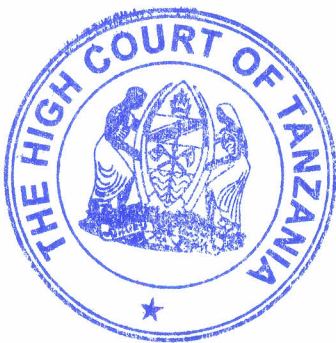
However, even if I were in a position to determine this issue too, my finding is that, in actual fact, the Mediator's decision which dismissed the applicant's application, did not rely on the past dates orders in respect of the none appearance of the applicant before the Commission, but the Mediator's reference on those days were just used to cement the applicant's habit of having no interest with his application, thus failure to appear even on 15<sup>th</sup> May, 2018, the date that he dismissed the application for want of prosecution.

All said and done, as all grounds raised by the applicant lack merit, I hereby proceed to declare the applicant's application unmeritorious, hence dismissed.



**S.M. KULITA**  
**JUDGE**  
**24/11/2023**

**DATED at SHINYANGA** this 24<sup>th</sup> day of November, 2023.



**S.M. KULITA**  
**JUDGE**  
**24/11/2023**

