

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LABOUR DIVISION)**

**AT ARUSHA**

**APPLICATION NO. 23 OF 2022**

(C/F Dispute No. CMA/ARS/ARS/20/2021)

**ARUSHA GYMKHANA CLUB.....APPLICANT**

**VERSUS**

**SHAZIL OMARY.....RESPONDENT**

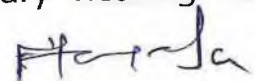
**JUDGMENT**

15/11/2023 & 26/1/2024

**MWASEBA, J.**

The applicant has filed this application after being dissatisfied with the decision of the Commission for Mediation and Arbitration (CMA) in CMA/ARS/ARS/20/2021. This court is moved to revise the proceedings and decision of the CMA which gave its award in favour of the respondent on the reason that there were no valid reasons for the termination of the applicant's employment and the procedures were not followed.

The respondent was an employee of the respondent since 06/04/2016 as a bar attendant for two years and he was given another contract on 1/7/2020 (Exhibit P1). Surprisingly on 3/10/2020 he was given a notice of suspension and notice to attend disciplinary hearing for



misconduct. He attended the disciplinary hearing on 13/10/2020 and the committee decided to terminate his employment. Aggrieved by the decision of the applicant, the respondent referred the matter to the commission claiming for unfair termination. He thus prayed to be awarded 36 months compensation and his other terminal benefits. At CMA Hon. Mediator ordered the applicant to be paid compensation of 12-month salary which includes one month salary, leave, severance payment and deducted two-month salary.

Aggrieved by the CMA decision, the applicant filed this application accompanied with the affidavit sworn by Mr. Josephat Msuya, counsel for the applicant. From the applicant's affidavit, the main complaint by the applicant is that the mediator acted beyond his powers when he assumed the role of arbitrator at the stage of mediation and the act of the respondent to be granted twelve-month compensation while he was employed under a specified term.

During the hearing of the application, Mr. Josephat Msuya, learned counsel appeared for the applicant while Mr. Yusuph Mlekwa learned counsel appeared for the respondent. However, the respondent's counsel and his client stopped entering appearance since 24/5/2024 without

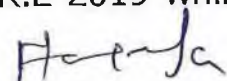


notice so, the matter proceeded ex parte. With the leave of the court the hearing proceeded by way of written submission.

Supporting the application, Mr. Msuya submitted that the award is illegal since the mediator assumed the power of arbitrator and entertained the application as arbitrator. He argued further that when the matter was called for mediation on 15/2/2021, it was then adjourned up to 18/2/2021 when both parties appeared. Further, it was adjourned to other dates then on 25/3/2021 it was heard ex-parte in the absence of the applicant herein whereby the mediator gave an award in favour of the respondent that he was unfairly terminated.

It was his further submission that it was wrong for the mediator to act as arbitrator as per **Section 40 (1) of the Employment and Labour Relations Act**, Cap 366 R.E 2019 since the information on mediation should not be used in any other proceedings as per **Rule 8 of the Labour Institution Mediation and Arbitration Guideline**, GN 67 of 2007. He also referred this court to the case of **Barclays Bank (T) Limited v. Ayyam Matesa**, Civil Appeal No. 481 of 2020.

Mr. Msuya argued further that failure of the mediator to complete the mediation within 30 days was contrary to **Section 86 (4) of the Employment and Labour Relation Act**, No. 366 R.E 2019 while the



parties never agreed to extend the time. Thus, he prayed for the court to grant the relief as prayed.

Having heard the submission made by the counsel for the applicant and after going through the record, the pertinent issue to be determined by this court is whether this application has merit or not.

The main claim of the applicant herein is for the act of the mediator to assume the role of the arbitration during the mediation stage which is contrary to **Section 40 (1) of the Employment and Arbitration Act**, Cap 366 R.E 2019. The said section provides that:

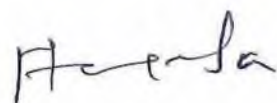
*"(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-*

*(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*

*(b) to re-engage the employee on any terms that the arbitrator or*

*Court may decide; or*

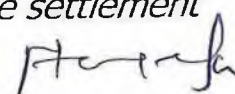
*(c) to pay compensation to the employee of not less than twelve months' remuneration."*



Based on the cited provision, Mr. Msuya submitted that it is the duty of the Arbitrator to conduct arbitration and not the mediator. I agree with Mr. Msuya that the mediator has no power to arbitrate the case before him/her but only to mediate the parties. In the case of **Barclays Bank T Limited v. Ayyam Matesa**, Civil Appeal No. 481 of 2020 CAT, 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 arbitration.

The law is very clear that all labour disputes filed at CMA must be mediated prior to be taken for arbitration stage. This is well provided under **Section 86 (3) of the Employment and labour Relations Act**, Cap. 366 R.E. 2019. There is no doubt that in the application at hand the Hon. Mediator proceeded to conduct arbitration instead of mediation which was the matter before him. Thus, I agree with Mr. Msuya that the Hon. Mediator assumed the power of the arbitrator by conducting arbitration during the mediation stage and issuing an award which is contrary to the law. As it was held in **Barclays Bank T Limited v. Ayyam Matesa** (supra) that:

*"... 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."*

Thus, it is the firm view of this court that, the mediator acted beyond his power to mediate the parties in their dispute and delivered an award. Thus, the mediator committed a fatal irregularity which rendered all the proceedings subsequent to the grant of award a nullity.


From the foregoing, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom. The interested party can file a fresh dispute at the Commission for Mediation and Arbitration (CMA).

Application is therefore allowed but no order for costs is made since this application emanates from labour dispute.

It is so ordered.

**DATED** at **ARUSHA** this 26<sup>th</sup> day of January, 2024.



  
**N.R. MWASEBA**  
**JUDGE**