

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

**LABOUR REVISION NO. 07 OF 2023**

*(Originating from Labour Dispute No. CMA/SHY/KHM/16/2023)*

**BLASIUS KIYABI NTIBASHIMA ..... APPLICANT**

**VERSUS**

**BULYANHULU GOLD MINE LTD ..... RESPONDENT**

**JUDGMENT**

5<sup>th</sup> December 2023 & 23<sup>rd</sup> February, 2024

**MASSAM, J.:**

The Applicant herein was an employee of the Respondent herein in a position of Plant Operator 2. That the Applicant was terminated by the Respondent on allegation of misconduct. The Applicant being aggrieved by the said termination opted to challenge his employer's decision before the Commission for Mediation and Arbitration as he was dissatisfied with his termination as he claimed that his employer had not conducted a medical check-up prior to his termination.

The Applicant thus opted to challenge his termination but he was already late in referring the matter to the Commission for Mediation and Arbitration (CMA). He therefore filed an application for condonation, via

Labour Dispute No. CMA/SHY/KHM/16/2023 requesting for leave to refer the dispute to CMA out of time.

The reasons advanced by the Applicant for the grant of condonation as per paragraph 4,5,6,7,8,9,10 and 11 of his affidavit in support of application before CMA was sickness, crave for legal advice from different institution as well as prosecution of the suit before the court of law.

The Respondent contested the Applicants' application before the CMA through filing a counter affidavit which was proceeded by a notice of preliminary objection on point of law to the effect that, (1) That the matter was res judicata and (2) That the Application was in abuse of the court process.

The hearing of the preliminary objection on points of law proceeded the main application and after a full hearing of the matter the CMA was satisfied that the preliminary objection raised by the Respondent was of merit and proceeded to dismiss the Applicants application and direct that the matter be remitted to proper channel for its determination.

Aggrieved by the aforesaid decision, the Applicant preferred this application for revision under the provisions of Section 91 (1) (a), (b)(2)(a)(b) (c) 94(l)(b)(i) of the Employment and Labour Relations Act Cap 366 R.E 2019, Rules 24(1), (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d), of the Labour Court Rules, G.N. No. 106 of 2007.

The Applicant prays for this honourable court to be pleased to examine, revise and set aside the proceedings and award of the Commission for Mediation and Arbitration at Shinyanga Region in the Labour Dispute dated 11th May, 2023 by Hon. Magreth A. D. Kiwara in the Labour Dispute No. CMA/SHY/KHM/16/2023. The Applicant in his affidavit prayed this Honourable court to assess the following legal issue:-

- 1. That, the learned Arbitrator erred in law and fact by sustaining the preliminary Objection on the reason that the Applicant dispute referred against the Respondent contravenes provisions of section 9 of the civil Procedure Code, [ Cap 33 R.E 2019]*

When the matter was called for hearing, by consent of the parties the matter was heard by way of filing written submission, Mr. Gervas Genea, a learned advocate appeared by representing the Applicant and submitted in support of application. The Respondent on the other hand



was duly represented by Mr. Faustine Antony Malonga, learned advocate who submitted in opposing the application.

Arguing in support of application, Mr. Genea submitted that the sole legal issue for determination is whether the Applicant's Application is res judicata. Consequently, the same is an abuse of the Court Process.

Furthermore Mr. Genea submitted that, by looking at the impugned Ruling, the CMA dismissed the said labour dispute referred by the Applicant against the Respondent on the allegations that the same was res judicata. Thus, abuse of court process, in terms of multiplicity of actions founded on the Judgment of the Shinyanga Resident Magistrates Court at Shinyanga that is Annexure "BGML-1" in the Respondent's Counter Affidavit.

The Applicants counsel cited the provision of Section 9 of the Civil procedure Code Cap 33 as well as the case of **George Shambwe v. Tanzania Italian Petroleum Company Ltd**, [1995] TLR 21, where the requirements for the doctrine of res judicata were laid down as follows:

*"For res judicata to apply not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties,*

*but it must also be shown that the matter was finally heard and determined by a competent court."*

The Applicants counsel referred this court to the impugned decision and further stated that, the question for determination is whether the Resident Magistrate court at Shinyanga was a competent Court to determine the said suit?. In elaborating this issue, the Applicants counsel referred this court to the case of **Bulyanhulu Gold Mine Ltd & 2 Others v. Martine Julius Masenya**, Consolidated Civil Appeal No. 16 & 17 of 2022, High Court of Tanzania at Shinyanga (unreported) where it was ruled out that,

*"Therefore, it is the provision of the law that civil wrong arising out of the employment relationship between parties is regulated by Section 88 of the ELRA or Section 51 of the Labour Institution Act which both provides exclusive jurisdiction to the CMA or labour court subject to the pecuniary limits."*

Basing on the submission made, the Applicants counsel is of the view that, the Applicant's dispute against the Respondent at the CMA is not barred by res judicata for having not been finally determined by the Court of competent jurisdiction hence prays that this court to set aside the impugned CMA Ruling, and consequently order hearing de novo of



the said Labour Dispute No. CMA/SHY /KHM/ 16/2023 before another Mediator.

In response, the counsel for the Respondent submitted that, the Applicant's main argument is that the Resident Magistrate's Court was not competent to try the suit. The respondent's counsel is of the view that, such an issue was supposed to be addressed in an appeal or revision against the judgment issued in Civil Case No. 02 of 2021. That, since no higher court has ruled that the Resident Magistrate's Court was incompetent to determine Civil Case No. 02 of 2021, then its judgment is still valid and binding. For this reference was made to the case of, **Mwanaisha Kapera (Administratrix of the Kapera Katumba) v. Salim Suleiman Hamdn**, Civil Reference No. 8 of 2021, Court of Appeal of Tanzania at Tanga (unreported), **Hamis Mohamed (As the Administrator of the Estate of the late Risasi Ngawe) v. Mtumwa Moshi (As Administratrix of the Estate of the late Moshi Abdallah)**, Civil Appeal No. 87 of 2020, CAT at Dar es Salaam.

Basing on the strength of the cases cited above, the respondent counsel is of the view that, The Applicant was at liberty to challenge the judgment of the Resident Magistrate's Court in the High Court.

The Respondents counsel further distinguished the case of **Bulyanhulu Gold Mine Limited and others**(supra) from the current case as that, in that case an appeal was preferred while in the current appeal no any appeal had been preferred against the decision of the Resident Magistrate court.

In a brief rejoinder, the Applicant's counsel reiterated his submission in chief and insisted on the jurisdiction of any court in determining a dispute that is place before it and that the Resident magistrate Court lacked the requisite jurisdiction to entertain the suit that was before it. He also said that respondent in his submission he did not cite any law nor provision to support his claim.

To support his claim applicant brought a case of **Shyam Thanki and others V New Palace hotel** (1972) HCD 92 which was quoted with approval in the case of **Sospeter Kahindi v Mbeshi Mashini** civil appeal no 56 of 2017 court of appeal of Tanzania at Mwanza (unreported) which held that all courts in Tanzania are created by statute and their jurisdiction is purely statutory, It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not posses". Furthermore in his reply of his submission respondent stated that the applicant has no power to declare that



Resident Magistrate judgment in Civil Case No. 2 of 2021 was incompetent to determine the dispute. In his view he submitted that such declaration was based on that decision of Martine Julius Masenya in consolidated civil appeal No 16 and 17 of 2022.

Having perused the CMA records and having analyzed the pleadings before this court and submissions from both parties, the issue that calls for the determination by this court is whether the CMA was correct in upholding the Respondents preliminary points of objection and in dismissing the Applicant's application for condonation.

It is important to note that, an application for condonation before the CMA is governed by Rule 11(3) of the Labour Institution (Mediation and Arbitration) Rules GN No 64/2007 which provides: -

*"(3) An application for condonation shall set out the grounds for seeking condonation and shall include the referring party's submission on the following-*

- (a) The degree of lateness;*
- (b) The reasons for lateness;*
- (c) Its prospects of succeeding with the dispute and obtaining the relief sought against the other party;*
- (d) Any prejudice to the other party; and*
- (e) Any other relevant factors."*



The overriding objective in an application for condonation is to determine as to whether the Applicant has adduced sufficient reasons for the grant of a condonation order or not. It is not for the CMA to rule out on the merit of the intended application yet to be filed before it.

That is to say that, the CMA was called by the applicant only to extend or refuse to extend the time within which the Applicant would file his application before it. It is unfortunate that even before the said application was granted or rejected the CMA prematurely pre-empted the gist of the main application yet to be filed before it by ruling out that the same was res judicata.

As rightly submitted by the counsel for the applicant that the principle of res judicata is governed by Section 9 of the CPC and according to this principle, a court is barred from adjudicating a suit or an issue involving the same parties if the said suit or issue was heard, determined and decided to its finality by another court with competent jurisdiction. The rationale behind the principle of res-judicata is to ensure that finality of judicial decisions is recognized by the parties and avoid multiplicity of cases.

In view of Section 9 of the CPC and the decision in **Paniel Lotta vs Gabriel Tanak and Other** [2003] TLR 312, the principle of res-

judicata applies where the following elements have been established or proved:

- 1. The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;*
- 2. The former suit must have been between the same parties or privies claiming under them;*
- 3. The parties must have litigated under the same title in the former suit;*
- 4. The Court which decided the former suit must have been competent to try the subsequent suit; and*
- 5. The matter in issue must have been heard and finally decided in the former suit.*

It is also important to note that, it is a legal requirement that all of the above elements must be established and proved for the principle of res judicata to apply and bar the subsequent suit.

In the current application, I find it that all the requirements were yet to be proved. I say so basing on the fact that the applicant was yet to file his application before the CMA for the same to be termed as Res-judicata. What was filed before the CMA was an application for

condonation and not a labour dispute hence the CMA was not proper to uphold the Respondents preliminary objection.


In the upshot and considering all what has been stated above, the revision application is of merit and the same is hereby allowed by quashing and setting aside the decision by the Commission for Mediation and Arbitration (CMA) that dismissed the Applicants Application for condonation. I further direct that, the CMA file be remitted back before the CMA for proper determination of an application for condonation before another Mediator. This application is therefore of merit and the same is granted.

In considering that this application emanates from labour dispute, no order as to costs is made.

It so ordered

**DATED at SHINYANGA** this 23<sup>rd</sup> day of February, 2024.



  
**R.B. Massam**  
**JUDGE**  
**23/2/2024**