

**IN THE HIGH COURT OF TANZANIA  
LABOUR DIVISION  
AT DAR ES SALAAM**

**REVISION APPLICATION NO. 407 OF 2021**

*(Arising from the Ruling issued on 3<sup>rd</sup> September 2021 by Hon. Fungo, E.J, Mediator, in Labour dispute  
No. CMA/DSM/ILA/970/20 at Ilala)*

**BETWEEN**

**WILLA MADEMA ..... APPLICANT**

**AND**

**THE AGA KHAN ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 16/08/2022  
Date of Judgment: 22/8/2022*

**B. E. K. Mganga, J.**

Applicant was an employee of the respondent. On 16<sup>th</sup> December 2019, respondent terminated employment of the applicant. After his termination, applicant filed dispute No. CMA/DSM/ILA/39/2020 but he withdrew it allegedly that it was out of time and that there was no application for condonation. He then filed dispute No. CMA/DSM/ILA/242/2020 together with an application for condonation, but

the same was struck out by the Mediator for being incompetent. the Mediator granted 42 days within which applicant to file a proper application. Finally, applicant filed dispute No. CMA/DSM/ILA/970/20 together with an application for condonation. On 3<sup>rd</sup> September 2021, Hon. Fungo, E.J, Mediator, delivered a ruling dismissing an application for condonation filed by the applicant on ground that applicant failed to account for each day of the delay for 87 days.

Applicant was aggrieved by the ruling dismissing his application for condonation hence this application for revision. In his affidavit in support of the application, applicant raised six (6) grounds namely:-

- 1. That the Mediator erred in law and facts in finding that the applicant first filed an application for condonation on 16<sup>th</sup> April 2020.*
- 2. The Mediator erred in law and facts in finding that applicant failed to account for each day of the delay that is 87 days from 16<sup>th</sup> April 2020 to 23<sup>rd</sup> December 2020.*
- 3. The Mediator erred in law and facts by failing to find that applicant had good cause for the delay of a single day.*
- 4. The Mediator erred in law and facts by failing to analyze the evidence produced by the parties during hearing of the application.*

*5. The said ruling is illogical, unlawful and irrational as it fails short of the reasons of which. The mediator had reached his findings and fails to analyze evidence.*

*6. The Mediator erred in law and facts in failing to condone the applicant's application for he had good cause and accounted for each day of the delay.*

In opposing the application, respondent filed both the Notice of Application and a counter affidavit affirmed by Jamil Kanji, her Human Resources and Legal Affairs officer.

When the application was called on for hearing, Mr. Kheri Kusekwa, Advocate, appeared and argued for and on behalf of the applicant, while Mr. George Shayo, Advocate, appeared and argued for and on behalf of the respondent.

Mr. Kusekwa learned counsel for the applicant opted to argue the application generally. In his submissions, he argued that applicant filed an application for condonation, but it was dismissed by the arbitrator. He submitted further that, on **16<sup>th</sup> January 2020**, applicant filed the dispute at CMA after he was terminated on **16<sup>th</sup> December 2019**. He argued further that, in terms of Rule 4 of GN. No. 64 of 2007, the date of termination must be excluded. He concluded that 30 days within which the applicant was supposed to file the dispute for unfair termination expired on

15<sup>th</sup> January 2020. He went on that, applicant filed dispute No. CMA/DSM/ILA/39/2020 before Kiwelu, Mediator, for the first time, but applicant withdrew it so that he can file application for condonation because he was out of time for one day. He argued that the matter was withdrawn on 02<sup>nd</sup> March 2020. He went on that, on 16<sup>th</sup> April 2020 applicant filed dispute No. CMA/DSM/ILA/242/2020 before Mahiza R.B, Mediator, and that, on 22<sup>nd</sup> December 2020, Mahiza R.B, Mediator, struck out the said dispute and granted leave to the applicant to file a new dispute within 42 days. On 31<sup>st</sup> December 2020, applicant filed dispute No. CMA/DSM/ILA/970/20 before Fungo, E.J, Mediator while within 42 days. On 03<sup>rd</sup> September 2021, Fungo, E.J. dismissed the application filed by the applicant on ground that it was filed out of time for 87 hence this application. Counsel for the applicant argued that the Mediator misdirected himself in dismissing the application filed by the applicant because, initially, applicant was out of time for a single day and that there was technical delay. He argued further that, applicant was out of time for a single day because on 25<sup>th</sup> December 2019 he travelled to Tabora to nurse his mother and attached proof for that travel. Counsel submitted further that, applicant fell sick while in Tabora and attached medical report from

Maitano Health Centre and that he was discharged on 14<sup>th</sup> January 2020. He submitted further that, on 15<sup>th</sup> January 2020 applicant was travelling from Tabora to Dar es Salaam hence it was difficult for him to file the dispute on same date because 30 days came to an end on the date he was on his way from Tabora to Dar es Salaam. He added that, as a proof of travel, applicant attached bus ticket.

Mr. Kusekwa learned counsel for the applicant, submitted that in order time to be extended, applicant must show that there was sufficient reason that caused him not to file the dispute within the prescribed period. He argued that applicant had sufficient reason as proved by both bus tickets and the medical report. He went on that it was an error on part of the Mediator to hold that there was no sufficient reason for the delay. He concluded that sickness is one of the ground for extension of time and cited the case of [Masunga Mbegeta & 784 Others V. The Honourable Attorney General & Another](#), Civil Application No. 173/01 of 2019, CAT (unreported), ***Mwana Mohamed v. Ilala Municipal Council***, Misc. Land Case Application No. 12 of 2020, HC (unreported) and ***Mostaquim Murtaza Darugar V. Magereth John Mbombo & 2 Others***, Misc. Land Case Application No. 353 of 2020, HC (unreported) to bolster his

submissions. He therefore prayed that the application be allowed by quashing and setting aside the CMA ruling dismissing application for condonation.

On his side Mr. Shayo, learned counsel for the respondent submitted that, respondent was not notified of dispute No. CMA/DSM/ILA/39/2020 hence he is unaware of it. He went on that; respondent became aware that applicant was granted leave at the time of hearing this application. He argued that respondent is aware of the dispute that was before Mahiza, Arbitrator. He admitted that, both parties appeared on 28<sup>th</sup> May 2020 at CMA and that the dispute was found defective, as a result, it was struck out and leave was granted to the applicant to file a proper dispute by 05<sup>th</sup> June 2020 and further that the dispute was scheduled for hearing on 25<sup>th</sup> June 2020. He went on that, instead of filing the dispute on the date it was ordered, applicant filed the proper dispute on 10<sup>th</sup> June 2020. He argued further that, on 23<sup>rd</sup> December 2020, the Mediator struck out the dispute filed by the applicant as he found that it was defective. Counsel for the respondent submitted further that, applicant thereafter filed CMA/DSM/ILA/970/20 that was heard by Hon. Fungo, who issued the ruling dismissing application for condonation. During submissions, Mr.

Shayo learned counsel for the respondent, conceded that there is no counter affidavit in the CMA record filed by the respondent. He however, maintained that respondent filed the counter affidavit.

It was submitted by Counsel for the respondent that applicant's termination letter is dated 13<sup>th</sup> October 2019 and that termination was effective from 16<sup>th</sup> December 2019. Mr. Shayo submitted that applicant did not account for the delay from 16<sup>th</sup> December 2019 the days before his travel to Tabora and that there is no proof of travel to Tabora. Mr. Shayo argued further that there is no proof that applicant's mother was sick on 27<sup>th</sup> December 2019 and that applicant fell sick. He went on that, there is discrepancy of applicant's affidavit and annexures thereto. Mr. Shayo argued that in the affidavit, applicant deponed that he arrived in Dar es Salaam on 15<sup>th</sup> January 2020, but he filed the dispute on 16<sup>th</sup> April 2020 but did not accounted for that delay. Mr. Shayo concluded that there was neither technical delay nor sickness on part of the applicant and prayed that the application be dismissed.

In rejoinder, Mr. Kusekwa submitted that Kiwelu's Ruling is clear that the other party did not attend. He argued that in the said application, CMA F1 shows that it was received and stamped by the respondent hence

respondent was aware. On whether respondent filed the counter affidavit to oppose the application for condonation, Mr. Kusekwa submitted that no counter affidavit was filed by the respondent.

I have carefully read the CMA record and considered submissions of the parties in this application and find that the only issue in controversy between the parties is whether, in the application for condonation, applicant adduced sufficient reasons. It was submitted on behalf of the applicant that there was technical delay and further that he was sick, which is why, he failed to file the dispute within the time prescribed under the law. This submission was resisted by counsel for the respondent who had a different view that there was neither technical delay nor sickness of the applicant. During submissions, it was conceded by counsel for the respondent that there is no counter affidavit in the CMA record opposing what was deponed by the applicant as reasons for the delay. However, quickly counsel for the respondent submitted that respondent filed the counter affidavit. Counsel for the applicant maintained that applicant was not served with the counter affidavit of the respondent opposing application for condonation. I have examined the CMA record and find that there is not counter affidavit that was filed by the respondent opposing an



application for condonation. Submissions by counsel for the respondent that respondent filed the counter affidavit bears not evidence on record. My conclusion is further fortified by the absence in the ruling dismissing the application for condonation any reference to what was deponed in the counter affidavit. In other words, no counter affidavit by the respondent was referred to in the said ruling. That being the case, I safely conclude that no counter affidavit was filed by the respondent.

It is a settled principle of law that both affidavit and counter affidavit are substitutes of oral evidence. See ***Uganda v. Commissioner of Prison Exparte Matovu*** [1966] EA 514, ***Phantom Modern Transport (1985) Ltd v. DT Dobie (TZ) Ltd***, Civil References Nos. 15 of 2001 and 3 of 2002, CAT(Unreported), ***Bruno Wenceslaus Nyalifa v. the permanent Secretary, Ministry of Home Affairs & Another***, Civil Appeal No. 82 of 2017 ,CAT (Unreported), ***Rosemary Stella Chambejairo v. David Kitundu Jairo***, Civil Reference No. 6 of 2018, CAT (unreported), ***Rustamali Shivji Karim Merani v. Kamal Bhushan Joshi***, Civil Application No. 80 of 2009 (unreported) to mention but a few. That being the position of the law, matters either not in the affidavit or

counter affidavit cannot be taken as evidence. They are submissions from the bar that is not evidence as it has been held several times. See ***Bruno's case*** (Supra). Since no counter affidavit was filed by the respondent to counter what applicant deposed in his affidavit in support of the application for condonation, then, there was no evidence by the respondent which the mediator could have used to dismiss the application for condonation. It was an error on part of the mediator to dismiss an application for condonation filed by the applicant based on submissions made on behalf of the respondent from the bar. Those submissions are not evidence. Therefore, the application for condonation was dismissed based not on evidence on record. It has been consistently held by this court and the Court of Appeal that cases should be decided based on evidence adduced and not based on submissions or an extraneous issue. It is my view therefore, that, both technical delay and sickness by the applicant were not countered.

I have examined the CMA record and find that on 2<sup>nd</sup> March 2020 respondent failed to enter appearance and further that dispute No. CMA/DSM/ILA/39/2020 was withdrawn because applicant noted that he

was out of time. The CMA record shows that CMA F1 in that dispute was filed on 16<sup>th</sup> January 2020 and upon application by the applicant, Kiwelu, L, mediator marked it as withdrawn. It was indicated in the said application that the dispute arose on 16<sup>th</sup> December 2019. It is my view that, applicant was wrongly advised because the dispute was within time. As correctly submitted by Mr. Kusekwa counsel for the applicant, in terms of Rule 4 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007, the date of termination must be excluded when counting time within which to file the dispute at CMA. Having excluded that date, the dispute was filed on the 30<sup>th</sup> day.

It is also not in dispute that on 22<sup>nd</sup> December 2020, Hon. Maiza, R.B, mediator delivered a ruling striking out the application for condonation and granted applicant 42 days within which to file a proper application. Applicant filed a new dispute with an application for condonation on 31<sup>st</sup> December 2020 that is the subject of this application. At the time of filing that dispute, he was well within 42 days granted to him by Hon. Maiza R.B, mediator. It was again an error on part of Hon. Fungo, E.J, Mediator, in his

ruling dismissing the application for condonation on 3<sup>rd</sup> September 2021 to hold that applicant failed to account for 87 days of delay.

For the foregoing, I hereby allow the application and grant condonation to the applicant. I therefore, direct that parties should go back to CMA if they are still interested, so that the dispute can be heard on merit.

Dated at Dar es Salaam this 22<sup>nd</sup> August 2022.



B. E. K. Mganga  
**JUDGE**

Judgment delivered on this 22<sup>nd</sup> August 2022 in the presence of Willa Madema, the applicant and Praygod Uisso Advocate holding brief of George Shayo, Advocate for the respondent.



B. E. K. Mganga  
**JUDGE**