

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**  
**REVISION APPLICATION NO. 191 OF 2022**

*(Arising from the Ruling delivered on 10/5/2022, Hon. Kalinga C, Mediator, in Labour dispute No.  
CMA/DSM/ILA/276/2021 at CMA Ilala)*

**SUZANA MWANYAVA ..... APPLICANT**

**VERSUS**

**CARDINAL RUGAMBWA HOSPITAL ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 12/09/2022  
Date of Judgment: 23/09/2022*

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

On 5<sup>th</sup> March 1995, Suzana Mwanyava, the applicant was employed by the respondent for two years fixed term contract as Assistant Nursing Officer. The contract was renewed several times. On 17<sup>th</sup> November 2018, applicant signed the two-year fixed term contract expected to expire on 17<sup>th</sup> November 2020. On 1<sup>st</sup> June 2020 applicant was served with a letter of termination of her employment contract with effect from 29<sup>th</sup> May 2020 allegedly that she committed misconducts namely stealing and fraud. Aggrieved with termination, applicant referred labour dispute No. CMA/DSM/ILA/509/2020/337 to the

Commission for Mediation and Arbitration (CMA) at Ilala. On 27<sup>th</sup> November 2020, respondent filed a preliminary objection that the Form referring the dispute at CMA (CMA F1) was defective because it was not signed or dated and further that applicant signed the CMA showing that the dispute was relating to both fairness of termination and breach of the contract. On 5<sup>th</sup> February 2021, Hon. Igogo M, Arbitrator, delivered a ruling striking out the dispute after sustaining the preliminary objection that the dispute was incompetent as she found that CMA F1 was neither dated nor signed by a competent person. The arbitrator granted fourteen (14) days to the applicant to file a proper dispute.

Applicant filed Labour dispute No. CMA/DSM/KIN/95/21 at CMA Kinondoni. On 21<sup>st</sup> April 2021, respondent raised two preliminary objections namely (i) that the dispute is non-maintainable in law for lacking a legal mandatory for condonation and (ii) that the dispute was lodged in a wrong registry contrary to Rule 22(1) of the Labour Institutions (Mediation and Arbitration Guideline) Rules GN. No. 64 of 2007. On 15<sup>th</sup> July 2021, Hon. M. Chengula, Mediator, delivered a ruling striking out the dispute after having found that the dispute arose within Ilala district and not Kinondoni district and that it was supposed to be filed within Ilala district and not Kinondoni District.

On 19<sup>th</sup> July 2021, applicant filed Labour dispute No. CMA/DSM/ILA/276/2021 at CMA Ilala together with CMA F2 for condonation. Again, on 5<sup>th</sup> August 2021, respondent filed a notice of preliminary objection that (i) the application was defective for want of notice of representation and (ii) the application was defective for want of enabling provision. On 12<sup>th</sup> November 2021, Hon. Mahindi P. P. Mediator, delivered the ruling upholding the preliminary objection that the application for condonation was defective for non-citation consequently struck out the application for condonation. On the same date at 10: 48 and 10:47 Hrs, applicant and respondents were served with the ruling striking out applicant's application.

On 19<sup>th</sup> November 2021, applicant filed CMA F1 she signed on 18<sup>th</sup> November 2021 for breach of contract claiming to be paid (i) TZS 1,425,000/= being remuneration for the remaining period of the contract, (ii) TZS 285,000/= being payment in lieu of notice, (iii) TZS 285,000/= being payment for unpaid leave and (iv) TZS 20,000,000/= being general damages. In the said CMA F1, applicant indicated that the dispute arose on 1<sup>st</sup> June 2020. Together with the said CMA F1, applicant filed an application for condonation CMA F2 supported by her affidavit. In CMA F2 signed on 18<sup>th</sup> November 2021, applicant indicated that the dispute arose on 1<sup>st</sup> June 2020 and that she was late for 5 days

and reasons for the said lateness was that she was conducting legal research on law regulating applications at CMA. Respondent raised a preliminary objection that (i) the application was defective for want of notice of representation, (ii) the affidavit in support of the application for condonation is defective for want of signature of the applicant, date, and place of attestation and (iii) the application for extension of time is defective because the verification clause of the affidavit supporting the application was defective. On 10<sup>th</sup> May 2022, Hon. Kalinga C, Mediator, delivered a ruling upholding the preliminary objection that in the application for condonation filed by the applicant there is no signature and date of attestation hence dismissed an application for condonation.

Aggrieved with that ruling, on 22<sup>nd</sup> June 2022, applicant filed this supported raising four (4) grounds namely :-

- 1. That the Arbitrator erred in law for dismissing the application that was incompetent.*
- 2. That the Arbitrator erred in law for not abiding by the principle of Judicial Precedent.*
- 3. That the Arbitrator erred for holding that the omission was incurable.*
- 4. That the Arbitrator erred in law and fact for punishing the applicant for mistakes done by his(sic) Advocate.*

Mr. Honest Antony, the principal officer of the respondent filed a counter affidavit to resist the application by the applicant. When the

application was called on for hearing, applicant was represented by Mr. Emanuel Makungu, Advocate while respondent was represented by Mr. Nixon Tugara, advocate.

Submitting in support of the application Mr. Makungu, learned advocate abandoned the 2<sup>nd</sup> ground and argued only the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> grounds. Submitting on the 1<sup>st</sup> ground, learned counsel argued that the Mediator dismissed the application for condonation based on the preliminary objection that was raised by the respondent because the affidavit in support of the application was defective. He argued further that the Mediator was supposed to strike out the application instead of dismissing it. He cited the case of ***Director of Public Prosecutions V. Dodoli Kapufi & Another***, Criminal Application No. 11 of 2008, CAT (unreported) to support his arguments.

Arguing the 3<sup>rd</sup> ground, Mr. Makungu submitted that the affidavit was not defective. He went on that the Mediator found that the affidavit in support of the application for condonation had no signature, but the affidavit had applicant's signature hence it was not defective. Arguing in alternative, he submitted that if the Mediator found that the jurat was defective, then, he was supposed to order the affidavit be amended. In support of his arguments, he referred court to the case of ***Finca***

***Tanzania Ltd V. Wildman Masika & 11 Others***, Civil Appeal No. 173 of 2016.

Submitting on the 4<sup>th</sup> ground, counsel for the applicant argued that the Mediator punished applicant for mistakes done by her Advocate. He argued that the Mediator held that the Advocate repeated mistakes several times. He further argued that an Advocate committed mistakes four times, but he conceded that there is no affidavit of the Advocate to the effect that the advocate committed mistakes and strongly argued that applicant should not be punished for that mistake. He cited the case of ***Zuberi Mussa v. Shinyanga Town Council***, Civil Application No. 3 of 2007, CAT (unreported) to the position that the Advocate can commit a mistake and that the mistake can amount to negligence if repeated. He concluded his submissions by praying that the application be granted so that the application for condonation can be heard at CMA.

Responding to submissions made on behalf of the applicant, Mr. Tugara, advocate for the respondent submitted on the 1<sup>st</sup> ground that the Mediator dismissed the application because applicant repeated the mistake several times. He cited the case of ***Tanzania Posts Corporation v. Victor Masalu***, Revision No. 14 of 2015 (unreported) to support his argument that if the party repeats a similar mistake, the matter must be dismissed.

Submitting on the 3<sup>rd</sup> and 4<sup>th</sup> grounds, Mr. Tugara argued that there was no signature of the applicant on the affidavit in support of the application for condonation. He argued that mistakes of the Advocate are equally that of the client. He went on that, applicant had four Advocates including Mr. Makungu and that they could have avoided the mistake. However, during submissions, he conceded that there is no law providing that a certain number of Advocates cannot commit mistakes. Counsel summed up his submissions by praying that the application be dismissed for want of merit.

In rejoinder, Mr. Makungu reiterated his submissions in chief and prayed that the application be allowed.

I have examined the CMA record and considered submissions made on behalf of the parties and find that prior to the impugned ruling, there were other rulings striking out disputes filed by the applicant on different dates as pointed out hereinabove. It is undisputed by the parties that an application for condonation filed by the applicant was dismissed based on ground that applicant did not sign and insert date immediately before signing the verification clause though the Mediator found that both the verification clause and the jurat were properly signed. It is my firm opinion that such an omission was curable. That omission did not in my view, warrant dismissal of the application for

condonation. It is a settled law that the proper legal remedy for an incompetent application before the court is striking it out and not dismissing it. I therefore hold that, for the need to do justice, parties should go back to CMA for the application to be heard by the arbitrator. I have formed that opinion because the application was dismissed by the mediator, whose roles and duties are limited to mediation and not arbitration as it was held by the Court of Appeal in the case of *Barclays Bank T. Limited vs AYYAM Matessa*, Civil Appeal No. 481 of 2020, [2022] TZCA 189. Since, the application was dismissed by the mediator who has no jurisdiction, I allow the application and direct the parties to go back to CMA so that the application can be heard by the arbitrator.

Dated in Dar es Salaam on this 23<sup>rd</sup> September 2022.



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

Judgment delivered on this 23<sup>rd</sup> September 2022 in chambers in the presence of Emanuel Makungu, Advocate for the applicant and Nixon Tugara, advocate for the respondent.



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