

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

**REVISION APPLICATION NO. 382 OF 2022**

*(Arising from the Ruling issued on 30/9/2022 by Hon. Mollé, B. L, Mediator in Labour dispute No.  
CMA/DSM/ILA/202/2022 at Ilala)*

**NELSON MWAIKAJA ..... APPLICANT**

**VERSUS**

**GEMSHAD ISMAIL & USANGU GENERAL TRADERS ..... RESPONDENTS**

**JUDGMENT**

*Date of last Order: 09/02/2023  
Date of Judgment: 28/2/2023*

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

Brief facts of this application are that, on 14<sup>th</sup> April 2022, applicant filed Labour dispute No. CMA/DSM/ILA/202/2022 before the Commission for Mediation and Arbitration henceforth CMA at Ilala showing that in February 2005 he entered into employment relationship with the respondent in the position of driver. In the Referral Form(CMA F1), applicant indicated that the nature of the dispute is breach of contract and that the same arose in November 2005. He further indicated that he was claiming to be paid a total of TZS 78,000,000/= namely (i) TZS 36,000,000/= being unpaid salary for 13 years and (ii) unspecified

amount for loss of use of his driving licence and (iii) a declaratory order that by withholding his driving licence, he continued to be an employee of the respondent. Applicant filled Part B of the said CMA F1 showing that he commenced his employment with the respondent in February 2005 and that the same was terminated in November 2005. On fairness of reason for termination, he indicated that no valid reason was offered by the respondent in terminating his employment. On fairness of procedure, he indicated that procedures for termination were not complied with. Being aware that he was out of time, applicant filed an application for condonation (CMA F2) supported by his affidavit. On degree of lateness, he indicated in the said CMA F2 that he was late for 16 years because there was pending matters of the same nature in other courts. On reason for that lateness, he indicated in the said CMA F2 that he has been pursuing same matter in the courts as per attached annexure. The annexures referred to by the applicant are (i) an ex parte judgment of the Resident magistrates Court of Dar es Salaam at Kisutu in Civil Case No. 379 of 2006 delivered on 25<sup>th</sup> March 2009 by Hon. E.H. Mingi-PRM (as she then was), (ii) the decree of the said court in the said case dated 25<sup>th</sup> March 2009 signed by the successor Principal resident Magistrate, (iii) proceedings of the said Court relating to Execution No. 118 of 2019 arising from Civil case No. 379 of 2006

between applicant and the respondent, to mention but a few. In his affidavit in support of the application for condonation, applicant deponed *inter-alia* that, in 2005 he was employed by the respondent as a driver and that it was a prerequisite condition for a driver to surrender the driving licence to the respondent who retained it as long as employment remained valid. He stated further that, his employment was unfairly terminated by the respondent in November 2005. That, he filed the aforementioned Civil case No. 379 of 2006 against the respondent for unlawful termination and that on 25<sup>th</sup> March 2009 respondent was ordered to pay TZS 5,200,000/= as compensation for withholding his driving licence and TZS 10,000,000/= as general damages and costs. That, the claim of unlawful termination was an issue before the aforementioned court but the court was unclear to that issue as a result, the said issue has not been dealt with. That, on 23<sup>rd</sup> December 2020, respondent paid the decretal sum of TZS 17,309,000/= as reflected in the court's proceedings in Execution No. 118 of 2019 arising from Civil case No. 379 of 2006 but respondent did not surrender his driving licence.

The application for condonation was before Hon. Mollel, B. L, Mediator, who issued an order that the same it will be disposed by way

of written submissions. On 10<sup>th</sup> June 2022, counsel for the applicant filed written submissions in support of condonation raising three issues namely (i) whether the continued holding of applicant's driving licence made employment with the respondent to be on going, (ii) whether respondents have legally terminated applicant's employment and (iii) whether applicant is entitled to terminal benefits.

On 24<sup>th</sup> June 2022, respondents filed written submissions opposing the application for condonation. Together with the said written submissions, respondents filed the notice of preliminary objection that the matter is *res judicata*.

When the parties appeared before Hon. Mollel, B.L, Mediator on 6<sup>th</sup> July 2022, respondents prayed that the preliminary objection they have raised be determined prior determination of the application for condonation. Counsel for the applicant had no objection, as a result, the mediator ordered that the said preliminary objection will be disposed by way of written submissions. The parties complied with submission orders. On 30<sup>th</sup> September 2022, Hon. Mollel, B.L, mediator, having considered submissions of the parties issued a ruling upholding the preliminary objection that the matter is *res judicata* and proceeded to dismiss the dispute filed by the applicant.

Aggrieved with the said ruling, applicant filed this Revision seeking the court to revise it. In his affidavit in support of this application, applicant raised three issues namely:-

- 1. Whether the dispute was res judicata considering that withholding of the driving licence revived employment with the respondents.*
- 2. Whether it was justifiable to hold that the matter was res judicata while the dispute has not been determined by any court or tribunal or any quasi-judicial body in Tanzania.*
- 3. Whether the dismissed applications were not the applications excepted as suit arising from judgments.*

Respondents filed the notice of opposition and the counter affidavit affirmed by Gemshad Ismail to oppose the application.

When the application was called on for hearing, Mr. Godfrey Ukwonga, learned advocate, appeared, and argued for and on behalf of the applicant while Ms. Rosemary John Mzee, learned advocate appeared and argued for and on behalf of the respondents.

During hearing, I asked the parties to address the court whether, the Mediator had jurisdiction to determine the matter between the parties or issue the impugned ruling.

I will address myself on the above jurisdictional issue before dealing with the issues raised by the applicant and responded to, by counsel for the respondents.

Responding to the issue raised by the court, Mr. Ukwonga, learned advocate for the applicant submitted briefly that the Mediator have no powers. On the other hand, Ms. Mzee, learned Advocate for the respondents submitted that the Mediator and CMA have no jurisdiction.

It is undisputed facts that the impugned ruling was issued by Hon. Mollel, B.L, Mediator. In his brief submissions, counsel for the applicant submitted that the Mediator has no power to issue to impugned ruling. But counsel for the respondent submitted that the Mediator have powers.

I have read the provisions of section 86(4), (7),(8) of the Employment and Labour Relations Act[ Cap. 366 R.E. 2019] and find the powers of the Mediator is to assist the parties to resolve the issue by settlement. The mediator can only do so by helping the parties to settle their dispute as provided for under Rule 3(1)and (2) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No.67 of 2007. The said Rule 3(1) and (2) of GN. No. 67 of 2007 (supra) provides:-

*"3(1) Mediation is a process in which a person independent of the process parties(sic) is appointed as mediator and **attempts to assist them to resolve a dispute and may meet with the parties either***

***jointly or separately, and through discussion and facilitation, attempt to help the parties settle their dispute.***

***(2) A mediator may make recommendations to the parties suggesting for settlement if, the parties to the dispute agree or the mediator believes it will promote settlement. Recommendations made are not binding on the parties; it is only persuasive and aims to assist the parties to settle a dispute.***”

It is my view that, in hearing the parties on submissions made in respect of the preliminary objection raised by the respondent that the matter was res judicata and finally delivering a ruling thereof cannot be said that the mediator was assisting the parties to resolve the dispute through discussions and facilitations or that the mediator was helping the parties to settle the dispute as provided for under Rule 3(1) of GN. No. 67 of 2007 (supra). It cannot also be said that what the mediator did was in line with the provisions of Rule 3(2) of GN. No. 67 of 2007 (supra) namely making recommendations or suggestions to the parties with a view of promoting settlement. Again, hearing submissions relating to condonation does not fall in the mediation process and the powers of the mediator as quoted hereinabove. In my view, the bolded words in the above quoted rule, tells all.

I have read Part II of GN. 67 of 2007 (supra) that relates to mediation process and the powers of the Mediator, and I am of the

settled view that, in the whole part there is no Rule giving powers to the mediator to determine legal issues such as condonation or preliminary objections raised by the parties. Absence of such a Rule in my view, was intended to limit the powers and duties of the mediator to assist the parties to settle the dispute and not to determine legal issues that are the domain of the Arbitrator. In labour disputes, mediation is compulsory as provided for under Rule 4(2) of GN. No. 67 of 2007(supra). Therefore, all disputes filed at CMA must be mediated prior going to the arbitration stage. The issues of condonation and preliminary objection that the matter was res judicata were raised before the mediator even before commencement of mediation. In an application for condonation, an applicant seeks the court or CMA to extend a helping hand to the applicant otherwise the court or CMA will have no jurisdiction to determine the matter. In short, condonation goes to the jurisdiction. Once condonation is granted the parties goes back to the same mediator for the dispute to be mediated. In my view, giving jurisdiction does not fall in the powers of the mediator namely assisting the parties to settle the dispute. Worse, at any rate, the party who opposes condonation, cannot have confidence in the same mediator who allowed the application for condonation. In the line, the person who the preliminary objection was held against his favour cannot have faith



in the same arbitrator. I am of that view because mediation is rooted in confidence of the parties to the mediator which is why the is supposed to keep all information obtained during mediation process confidential as it is provided for under Rule 8(1), (2), (3) and (4) of GN. No. 67 of 2007 (supra). The said Rule 8 of GN. No. 67 of 2007 provides:-

***"8(1) Without prejudice mediation is a confidential process aimed helping the parties to a dispute to reach an agreement.***

*(2) Information disclosed during mediation may not be used as evidence in any other proceedings, unless the party disclosing that information states otherwise.*

*(3) The mediator may not be compelled to be a witness in any other proceedings in respect of what happened during the mediation(sic).*

***(4) The confidential nature of mediation proceedings prevents the Mediator, the parties and their representatives from disclosing any information obtained during mediation to any third party."***

In my view, grant or refusal of application for condonation is adjudicatory or arbitration process and not mediation process. Again, it cannot be said that in determining whether the matter was res judicata or not, the Mediator was exercising the roles of mediation provided under part II of GN. No. 67 of 2007. In my view, any decision that can be made by the Mediator on legal issue raised by either of the parties erodes confidence of one of the parties to mediation leading to failed

mediation. In the application at hand, the order of the Mediator does not fall in the ambit of the provisions of section 87(3)(a) and (b) of Cap. 366 R.E. 2019(Supra) or Rule 14(2)(a)(i)and (ii) of GN. No. 67 of 2007(supra) that are exceptional powers of the mediator. I have read section 20 of the Labour Institutions Act [Cap. 300 R.E. 2019] that provides powers of both the Mediator and Arbitrators and find that the said section does not give power the mediator to determine legal issues raised by the parties. In short, the Mediator had no power to either grant condonation or to dismiss the application filed by the applicant for being res judicata.

The court of Appeal had an advantage to discuss the powers of the Mediator in the case of [Barclays Bank T. Limited vs AYYAM Matessa](#), Civil Appeal No. 481 of 2020 [2022] TZCA 189 wherein it held *inter-alia* that:-

***"...Truly, under the ELRA the jurisdiction of a mediator as the title dictates, is to mediate, the process which does not include to dismiss and to decide a complaint. That would no doubt be a general rule. Under exceptional circumstances as it is in the provision under discussion, the mediator is empowered to dismiss the complaint if the referring party fails to appear and decide the same if the party against whom the referral is made fails to appear."***(Emphasis supplied)

Since the Mediator had no powers to decide whether the matter was res judicata or not, or to determine the application for condonations, I hereby quash and set aside the CMA ruling and direct the parties to go back to CMA where both the issue of condonation and the preliminary objection raised by the respondents will be determined by the competent Arbitrator.

Since the issue raised by the court has disposed the whole application, I will, for obvious reason, not discuss the issues raised by the applicant.

Dated in Dar es Salaam on this 28<sup>th</sup> February 2023.



B. E. K. Mganga

**JUDGE**

Judgment delivered on this 28<sup>th</sup> February 2023 in chambers in the presence of Godfrey Ukwonga, Advocate for the Applicant and Rosemary John Mzee, Advocate for the Respondents.



B. E. K. Mganga

**JUDGE**

