IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 306 OF 2022

BETWEEN

RUI WANG ..... APPLICANT

VERSUS

EMINENCE CONSULTING (T) LTD ..... RESPONDENT

JUDGEMENT

Date of last order: *14/02/2023*
Date of Judgement: *28/02/2023*

MLYAMBINA J.

In this application, the Applicant is challenging the Commission for Mediation and Arbitration (herein referred as 'CMA') Ruling delivered by Honourable Mbunda, P.J, Mediator dated 26th August, 2022 in a Labour Dispute No. CMA/DSM/KIN/289/2022 on grounds that the said Ruling was illegal, unlawful, and improperly procured. Before the CMA, the Applicant filed an application for condonation to file an application for breach of contract. The same was refused by the Mediator on the ground that the Applicant did not adduce sufficient reason for the grant of application for condonation sought. Aggrieved by the CMA's decision, the Applicant filed the present application on the grounds which will be apparent hereunder.

The application was ordered to be argued by way of written submissions. Before the Court, the Applicant was represented by Edrick Luimuka, Learned Advocate from Winstlaw Attorneys.

Before going to the merit of the application, Mr. Luimuka narrated the following background. That, the Applicant is a citizen of the People's Republic of China who has been employed by the Respondent in the position of Director of Operations under the fixed term employment contract of two (2) years renewable. He stated that the Applicant was recruited in China on 17th December, 2020 and his employment in Tanzania commenced on 23rd January, 2021.

Mr. Luimuka stated that the Applicant was stationed at Huawei Technologies Tanzania Company Limited as a Director of Operations and his salary per month was Tanzanian Shillings 12,540,000/=. It was submitted that; the Applicant managed to handle all his work and assignments and other duties assigned by the Respondent from time to time successfully. Surprisingly, with no reason, the Applicant was terminated from employment on 3rd September, 2021 by the Respondent. That, from the said shock, the Applicant suffered emotional and psychological stress that resulted to be diagnosed with hypertension and depression disorder (feeling down, irritated, worthless, suicidal

ideation, fatigue, body itching and feeling of foreign body sensation on 5th September 2021. Mr. Luimuka added that; the Applicant was hospitalized and treated in both Chinese Traditional therapy and attended normal hospital treatment at Aga Khan Hospital- Dar es Salaam as based on the Medical Report dated 24th May, 2022 which was submitted during the hearing of the application for condonation and admitted as exhibit.

The Applicant after being discharged based on the last checkup and the Medical Report Dated 24th May, 2022 from Aga Khan Hospital- Dar es Salaam he decided to file a labour Dispute at the CMA on 6th June, 2022 by filing an Application for condonation. Further, before the CMA, the Applicant prayed for leave to refer a dispute for the breach of his Employment Contract outside the prescribed time limit under *Rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, G.N No. 64 of 2007).*

Mr. Luimuka further added that; among the reasons for delaying filing the labour dispute within the prescribed time as provided was due to the sickness of the Applicant as he was diagnosed with hypertension and depression disorder on 5th September 2021. He said, an attachment of the medical report was filed in an affidavit in support of the

application for condonation and as well as this application. It was submitted that, it was unfortunate that the said application was heard and determined by Honourable Mediator Mbunda, P.J. conducting a hearing and delivering a Ruling dated 26th August, 2022 at the position of Mediator in a labour dispute No. CMA/DSM/KIN/289/2022. The Applicant was dissatisfied with the said Ruling. Hence, this Application for Revision that the said Ruling which is unfounded to be illegal, unlawful, illogical and improperly procured thus capable of being challenged, revised, set aside, and quashed on the following legal grounds:

i. That the Mediator erred legally and logically by not considering his powers provided under *Section 86(3) and (4) of The Employment and Labour Relations Act [Cap 366 Revised Edition 2019*].

ii. The Mediator erred legally and logically by not considering the Applicant's arguments that have been presented and the basic reasons attached to the Confirmation of the Medical report which was not contested by either party.

iii. The Mediator erred in law and fact in assessing the evidence presented and thereby reaching an erroneous finding that the sufficient reason presented by the Applicant is not enough.

Arguing in support of the application Mr. Luimuka prayed to adopt the Applicant's affidavit in support of this application for revision be adopted and form part of his submission in chief.

Starting with the first ground, that the Mediator erred legally and logically by not considering his powers provided under Section 86(3) and (4) of The Employment and Labour Relations Act [Cap 366 Revised Edition 2019] which provide as follows:

> *Section 86(3) On receipt of the referral made under subsection (1) the Commission shall -*
>
> *(a) appoint a mediator to mediate the dispute;*
>
> *(b) decide the time, date and place of the mediation hearing;*
>
> *(c) advise the parties to the dispute of the details stipulated in paragraphs (a) and (b).*
>
> *(4) Subject to the provisions of section 87, the mediator shall resolve the dispute within thirty days of the referral or any longer period to which the parties agree in writing.*

Mr. Luimuka submitted that; on the case of **Barclays Bank T. Limited v. AYYAM Matessa** (Civil Appeal 481 of 2020) [2022] TZCA 189 (12 April 2022); Maige, J.A held that:

> *The power of the Mediators is naturally limited to assisting the parties to resolve the dispute amicably the words to decide the complaint should not be construed literally as that would lead to absurdity. Truly under the ELRA the*

jurisdiction of the 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.

Mr. Luimuka submitted that; in respect of the above decision, it would take us as to whether the Mediator has the capacity to hear the condonation. He argued that the Court of Appeal of Tanzania in the above case was of the position that the Mediators' duties are limited and does not give a Mediator a duty to determine or decide a dispute but rather to resolve the dispute amicably. He was of the view that according to the current handling of dispute resolution of matters in the CMA, Mediators are distinct from Arbitrators, whereas the Arbitrators have the duty to hear, determine and decide a complaint.

Mr. Luimuka further submitted that; the current case at CMA was heard and determined by a Mediator and it is duly observed to have been delivered by a Mediator, who has never been an Arbitrator nor has such capacity as procedures provide. Hence causing his decision to be questionable in its end of justice and evidencing that the said Mediator had no jurisdiction to determine the said application for condonation. Hence, this application to quash and set aside the whole decision of the Mediator.

It was further submitted that; the Mediator proceeded to determine the substance of condonation without questioning his capacity to such juncture. The Counsel referred the Court to *section 86 (3) & (4) of the Employment and Labour Relations Act* and argued that the law provides the mandate and functions of limitation of Mediators and in that part the law does not provide such function of determining the substance of condonation. He was strongly of the view that the Mediator erred in law on determining an application for condonation.

Coming to the second ground, that the Mediator erred legally and logically by not considering the Applicant's arguments that have been presented and the basic reasons attached to the confirmation of the Medical Report which was not contested by either party. Mr. Luimuka submitted that; the reason for the delay is sickness. He stated that the Applicant presented the Medical Report which was received by the CMA as evidence and the Respondent did not challenge the said Medical Report.

Mr. Luimuka argued that it is well-settled principles of the laws that, in Tanzania, sickness is one of the good reasons to seek for extension of time upon being proven. That, there is no general acceptance way of proving the sickness rather than each case depends

on its unique circumstances and its facts. The counsel made reference to the reasoning of the Hon. Mediator on page 17 of the Award that:

> *the Applicant was admitted to the hospital as per paragraph 8 -9 of his affidavit. What the Applicant affirmed is "he got assistance to go to the hospital for further hospitalization.*

Mr. Luimuka thereafter challenged the Mediator's findings that the Applicant attached only a Medical Report which does not show an admission report, admission charges or even any document which shows that he was admitted to the Hospital. Thus, there is no agreed upon or general acceptance way of proving sickness rather than the medical report as tendered by the Applicant. To support his preposition, the counsel referred the Court to the case of **Pastory J. Bunonga v. Pius Tofiri** (Misc. Land Application 12 of 2019) [2020] TZHC 158 (06 February 2020); where Rumanyika J, (as he then was) held that:

> *Where it was on the balance of probabilities proved, sickness has been good and sufficient ground for extension of time yes. But with all fairness the fact cannot be founded on mere allegations. There always must be proof by the Applicant that he fell sick and for the reason of sickness he was reasonably prevented from taking the necessary step within the prescribed time.*

Mr. Luimuka continued to submit that; the Applicant had reasonable ground, good and sufficient evidence for the extension of time which were disregarded by the Mediator. He insisted that the Mediator did not consider the medical report as evidenced which was from a reputable hospital. Thus, left the Applicant losing all his rights in the matter at hand. He added that; the Applicant suffered loss and for being unfairly terminated from employment. The Mediator denied his right to seek for legal remedy and compensation. It was further submitted that; the Applicant had all the required working and resident permits which are valid and the same were submitted at CMA at all times of the application to its illegally dismissal.

In another ground, that the Mediator was wrong legally and logically by saying that the medical report is not enough to prove the disease without putting the admission report, admission charges or any documents showing that the Applicant was hospitalized. But the medical report is the fundament document proving sickness and showing the status of the patient was under the critical care (Intensive Care) of Doctors as the report says. Mr. Luimuka submitted that the Mediator was biased in making the analysis of the evidence presented by the

Applicant, which even cause doubt on its delay to being delivered without any reason.

He submitted that the Mediator erred in law and fact in assessing the evidence presented and thereby reaching an erroneous finding that the sufficient reason presented by the Applicant was not enough. He maintained that the Mediator neglected these facts and did not consider this crucial information and evidence as presented by the Applicant. It was further argued that the Mediator erred legally and factually by failing to comply with labour regulations as provided in the case of **Sunshine Transportation Ltd v. Pendo Chuwa,** Labour Revision No. 800/2018, High Court of Tanzania, Labour Division, delivered on 23rd December, 2019, By Hon Ngwembe, J, (unreported) where at page 6 it was decided that:

> *The general principle of law demand that, laws are made to be complied with, especially Courts/ tribunal must follow the letters of the law as it is, in order to satisfactorily deliver justice to the disputants.*

Mr. Luimuka further submitted that the law demands to be followed, this goes to the rules and procedures set under the law. He argued that on reaching the decision, the Mediator errored by not following scope of functions and other procedural laws provided under

Rule 5 of the Labour Institution (Mediation and Arbitration Guidelines) GN 67 of 2007 which provide as follows:

> *5 –(1) The mediator has the power to determine how the mediation shall be conducted.*
>
> *(2) The power of the mediator includes.*
>
> *(a)To require further mediation meetings between the parties, after the initial hearing scheduled by the Commission, provided that the mediator may do this after the period set aside for mediation has expired and in deciding whether to require further meetings the mediator may consider the following*
>
> *(i)The prospects of progress towards a settlement*
>
> *(ii)The consequences of a settlement or non-settlement being reached ...*

Mr. Luimuka was of the view that the labour laws nowhere provide for the mandate of the Mediator to determine either a complaint or any Application including condonation, hence an act of the Mediator determining condonation has gone beyond the line and jurisdiction provided by the law causing such a decision to be illegally reached. Mr. Luimuka prayed that in the circumstances and in the interest of justice, the intervention of this Honourable Court is of utmost importance to set aside and quash the whole decision and Ruling of the CMA.

After considering the Applicant's submissions, I find the Court is called upon to determine the grounds for the application for revision at hand.

Starting with the first ground, the Applicant is challenging the Mediators' power to determine the application for condonation. There are different schools of thought which will be looked at on the Mediator's power to determine an application for condonation. Before the Court of Appeal's decision in the case of **Barclays Bank T. Limited v. AYYAM Matessa** (supra), High Court Judges were in agreement that the Mediator have powers to determine an application for condonation and even decide the dispute ex-parte incase the other part fails to enter appearance. Numerous cases are vivid examples of where the Mediator granted condonation and there was no objection from the other party that the Mediator had no jurisdiction to do so. These cases include the case of **Jivan Mkambala v. Swahili Glass Aluminium Ltd,** Revision application No. 219 of 2021, High Court of Tanzania Labour Division at Dar es Salaam (unreported). In that case, the Mediator refused to grant an application for condonation and upon revision in this Court it was observed that sufficient reason was adduced for the grant of application for condonation prayed, hence the same was granted.

Again, in another case of **Mohamed Marekani v. Auric Air Services Limited,** Revision No. 964 of 2018, High Court of Tanzania Labour Division at Dar es Salaam (unreported) an application for condonation was refused at the CMA and the decision was upheld by the High Court.

Even after the Court of Appeal's decision in the case of **Barclays Bank T. Limited v. AYYAM Matessa** (supra) there are two schools of thought as to Mediator's power to determine an application for condonation. In the case of **Maria Jackson Mwita v. Vijiji Center Company Limited,** Labour Revision No. 109 of 2021, High Court of Tanzania at Arusha (unreported), an application for condonation was refused at the CMA and the decision was upheld by the Court.

However, in the case of **Ndovu Resources Limited v. Thierry Murcia,** Revision Application No. 371 of 2022, High Court of Tanzania at Dar es Salaam the Court held that the Mediator had no powers to grant the application for condonation following the Court of Appeal stand in the case of **Barclays Bank T. Limited vs AYYAM Matessa** (supra).

On the basis of the foregoing analysis, it is my view that to address this contentious issue at hand judiciously, it requires to examine the method of referring disputes at the CMA to the commencement of

mediation process. The method is provided from *Rule 12 of the Labour Institutions (Mediation and Arbitration) Rules, 2007, GN. No. 64 of 2007 (to be referred as GN. No. 64/2007).* For easy of reference, I hereunder quote the relevant provision:

> Rule 12(1) A party shall refer a dispute to the Commission for Mediation by completing and delivering the prescribed ("the referral document").
> (2) The referring party shall:
> (a) sign the referral document in accordance with rule 5;
> (b) attach to the referral document; a written proof, in accordance with rule 6, that the referral document was served on the other parties to the dispute;
> *(c) if the referral document is filed out of time, attach an application for condonation in accordance with rule 10.*
> (3) The Commission shall refuse to accept a referral document until the requirements of sub-rule (2) has been complied with.
> 13(1) The Commission shall give the parties at least 14 days notice in writing of the mediation hearing unless the parties agree to a shorter period of notice.
> (2) The parties shall be given at least seven days notice of any further meetings, although the parties may agree to a shorter period of notice.
> (3) The notice inviting the parties shall state the date, time and place of attendance.
> [Emphasis supplied]

From the above quoted provisions, it is crystal clear that an application for condonation is filed together with the referral document. The quoted provision does not direct as to whether the application for condonation should be determined first before mediation process commences or not. However, to have a clear meaning of the words of statutes, the provision should not be looked in isolation. This is the Court's position in the case of **Barclays Bank T. Limited v. AYYAM Matessa** (supra).

Therefore, under the provision of *Rule 15 of GN. No. 64/2007,* during mediation proceedings, the Mediator is empowered to determine jurisdictional issue relating to the dispute. The relevant provision is to the following effect:

> *Rule 15. Where it appears during mediation proceedings that a jurisdictional issue relating to mediation has not been determined, the Mediator shall require the referring party to prove that the Commission has the jurisdiction to mediate the dispute.*

Now the question to be addressed is whether time limitation falls within jurisdictional issue. The issue has been addressed in numerous decisions including the case of **Tanzania Fish Processors Ltd v.**

Christopher Luhanga, Civil Appeal No. 161 of 1994, it was observed that:

> *The question of limitation of time is fundamental issue involving.. jurisdiction as held by the Court of Appeal, it goes to the very root of dealing with dealing with civil claims. Limitation is material point in the speedy administration of justice. Limitation is thereto ensure that a party does not come to Court as and when he chooses*

Again, in the case of **Zephania O. Adina v. GPH Industries Ltd,** Labour Revision No. 27 of 2020, High Court of Tanzania Mwanza Sub Registry at Mwanza (unreported) where it was held that:

> *It is trite law, that, the first thing for the Court or tribunal to consider when approached is whether it has jurisdiction or not. If it is satisfied as to whether it has jurisdiction, it is when it can choose or determine the venue where the proceedings (mediation and arbitration) may be conducted.*

Therefore, time limit being one of the jurisdictional issues to consider, it is my view that pursuant to the provision of *Rule 15 of GN. No. 64/2007* the Mediator can determine an application for condonation. A dispute cannot be mediated by the Mediator if he/she has no jurisdiction to entertain the matter. Thus, the issue of determining an application for condonation should be considered first before mediating the particular dispute. It is my further finding that in the case of

Barclays Bank T. Limited v. AYYAM Matessa (supra) the debate was on the Mediator's jurisdiction to decide the complaint on merit. Which in my view an application for condonation does not determine the application on merit.

I cannot disregard the Applicant's submissions on this issue at hand. However, the relied provision of section 86(3) of Employment and Labour Relations Act by the Applicant's Counsel does not oust the Mediator's powers to determine jurisdictional issues which arise in mediation proceedings. The relevant provision only directs what to be done by the Commission upon receipt of a referral form.

As stated above, the provisions of the law cannot be read in isolation, mediation and arbitration proceedings are also governed by the Rules designed to regulate the same. Thus, the provisions in the relevant Rules must also be observed. On the basis of the above analysis, it is my finding that the Mediator was right to determine an application for condonation. Thus, the first ground lacks merit.

The second and third issues will be jointly decided in one ground as to; *whether the Applicant advanced sufficient reason for the grant of extension of time sought.* It has been decided in range of decisions that the powers to grant condonation is basically the discretion of the Court

and the powers to do so has to be exercised judiciously and upon sufficient cause shown. What amounts to sufficient cause has been defined in numerous Court decisions including the case of **Arisony Gilman v. A to Textile Mills Limited**, Revision No. 06/2013, High Court of Tanzania, Labour Division at Arusha (unreported) where it was held that:

> *What amounts to sufficient cause has been defined from decided cases, a number of factors has to be taken into account including whether or not the application has been brought promptly, the absence of any valid explanation for the delay, lack of diligence on part of the Applicant.*

In the application at hand, the Applicant was terminated from employment on 03rd September 2021 whereas his application for condonation was filed at the CMA on 07th June 2022. The Applicant's main reason for failure to file the application on time was the reason of sickness which according to his Counsel and the cases cited, it is a good ground for the grant of extension of time. The Applicant's nature of dispute at the CMA was on breach of contract. As per *Rule 10(2) of GN. No. 64/2007* disputes concerning breach of contract and any other disputes are supposed to be filed at the CMA within sixty (60) days from the date when the dispute arose.

By simple calculation, from the date the Applicant was terminated from employment to the date when the dispute was referred at the CMA, it is seven months (7) and four days (4) lapsed. The question to be addressed is; *whether the Applicant accounted for all the days of the delay.* It is a trite principle of law that a party should account for each day of delay. That is the Court's position in numerous decisions including the case of **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) where the Court of Appeal held that; I quote:

> *Delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.*

As stated earlier, the Applicant's reason for failure to file the application on time was due to sickness. In his affidavit in support of the application at the CMA from paragraph 8 he deponed as follows. That, immediately after being forced to vacate the office, he started looking for legal assistance and on 05th September 2021 he felt very bad and got assistance to go to the hospital for further treatment at Aga Khan Hospital – Dar es salaam. It was further deponed that after diagnosis

the Applicant was found with hypertension and hypertension disorder which made him feel like committing suicide.

The Applicant also attached the Medical Report to prove his assertion. Looking at the medical report attached it does not clearly state whether the Applicant was hospitalized for all the period he failed to file his application in time or not. The Medical Report further indicates that the plan for the visit was monthly visit. The statement which leaves no doubt that the Applicant was not hospitalized. The Applicant urges this Court to rely solely on the said Medical Report to grant the application for extension of time sought.

On the basis of the above analysis, I can't hesitate to join hands with the Arbitrator's findings that the Applicant has not proved how sickness prevented him from filing his application on time. He was an outpatient. He could have filed his application and proceeded with his medical treatment. Attending medical therapy did not prevent him in any way from filing the application for breach of contract on time. Thus, the CMA's decision is hereby upheld.

In the result, I find all grounds for revision in this application lacks merit. Since the Applicant has not adduced sufficient reason for the

grant of application for condonation sought, the CMA's award is hereby upheld. It is so ordered.

Y.J. MLYAMBINA

JUDGE

28/02/2023

Judgement pronounced and dated 28th February, 2023 in the presence of Counsel Manyama Nyambasi for the Applicant and in the absence of the Respondent.

Y.J. MLYAMBINA

JUDGE

28/02/2023