

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

**REVISION APPLICATION NO. 421 OF 2022**

*(Arising from an award issued on 24/10/2022 by Hon. Mikidadi, A, Arbitrator, in Labour dispute No. CMA/DSM/TEM/505/2019/102/2020 at Temeke)*

**TANZANIA CIGARETTE PUBLIC LTD COMPANY..... APPLICANT**

**VERSUS**

**NANCY MATHEW KOMBE..... RESPONDENT**

**RULING**

*Date of last Order & Ruling: 28/02/2023*

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

Brief facts of this application are that, on 01<sup>st</sup> July 2013 Tanzania Cigarette, the applicant employed Nancy Mathew Kombe, the respondent for fixed period contract of employment as Public Procurement Associate. After expiry of several contracts, on 29<sup>th</sup> April 2016 the terms of the contract changed where the respondent was employed for unspecified period. Parties maintained their employment relationship until 29<sup>th</sup> July 2019 when applicant terminated employment of the respondent on ground of gross negligence and breach of Company's policy. Aggrieved with termination, respondent referred the dispute before the Commission of Mediation and Arbitration(CMA) complaining that she was unfairly terminated.

After hearing evidence and submissions from both sides, on 24<sup>th</sup> October 2022, Hon. Mikidadi A, arbitrator, issued the award in favour of the respondent that termination was unfair and awarded respondent be paid TZS. 44,222,750/= . Applicant felt resentful with the award as a result, she filed this application.

When the matter was called on for hearing, Mr. Paschal Kamala, learned advocate appeared on behalf of the applicant while Mr. Maunda Raphael, learned advocate appeared on behalf of the respondent. Before the parties have conversed grounds of revision raised by the applicant, I asked learned advocates to address the court on propriety of the proceedings at CMA because the record shows that an application for condonation was determined by the mediator. It is from the record that having granted application for condonation, the mediator proceeded to mediate the parties and marked that mediation has failed and referred the parties to the arbitrator for arbitration.

Responding to the issue raised by the court, Mr. Paschal Kamala Counsel for the applicant submitted that, the matter was not properly heard at CMA because the mediator has no power to make decisions. He submitted further that; the roles of the mediator do not extend to decide which he made in this application. He added that condonation was

improperly granted and that all the subsequent proceedings were a nullity. He therefore prayed that CMA proceedings be nullified, the award be set aside, and the file be remitted back to CMA so that condonation can be properly heard, if granted, mediation process be conducted and thereafter the matter be heard by the arbitrator.

On the other hand, Mr. Maunda Raphael, learned counsel for the respondent submitted that condonation was supposed to be heard by the arbitrator and not by the mediator as it happened in the application at hand. He however prayed that the court should invoke the overriding objective principle and proceed to determine the matter on merit.

There is no dispute that application for condonation was heard and granted by the mediator. Both counsel share a similar position that condonation was supposed to be heard by the arbitrator and not the mediator. Point of departure between the counsel is what should be done by the court in that situation. While counsel for the applicant was of the view that the court should nullify the whole CMA proceedings, quash the award, and direct the parties to go back to CMA for the matter to be heard properly, counsel for the respondent was of the view that the court should invoke overriding objective principles and proceed to determine the matter on merit.

I have considered the rival arguments by counsel for the parties as to what should be done in the circumstances of this application. I can only direct what should be done after giving out the legal position on the powers of the mediator in relation to what was done in the application at hand.

A starting point in resolving this issue is part VIII of the Employment and Labour Relations Act [cap. 366 R.E. 2019] that relates to dispute resolution. Sub-Part A of the said part that relates to mediation covers sections 86 and 87 while sub-Part B that relates to arbitration covers sections starting from 88. From the wording of section 86 of cap. 366 R.E. 2019 (supra), once the dispute is referred before the Commission for Mediation and Arbitration, it must first be mediated by the mediator appointed under subsection (3) of section 86 supra. The said section provides: -

*"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)."*

In my view, the word to “mediate” does not include to determine legal issues including granting or refusing condonation or extension of time. I am of that view because in an application for condonation or extension of time, the court or CMA is called to exercise discretion, and it must only do so judiciously. As to what amounts to judicious discretion was held by the Court of Appeal in the case of [Mza RTC Trading Company Limited vs Export Trading Company Limited](#), Civil Application No.12 of 2015 [2016] TZCA 12 that:-

*"An application for extension of time for the doing of any act authorized ...is on exercise in judicial discretion... **judicial discretion is the exercise of judgment by a judge or court based on what is fair, under the circumstances and guided by the rules and principles of law ..."***

From the above holding of the Court of Appeal, in order to exercise judicial discretion, the court must be guided by fairness under the circumstance, rules and principles of law. In my view, determining an application for condonation, should consider circumstances, rules, and principle of laws. In my considered opinion, that cannot be said to be a mediation process.

I have read the provisions of section 86(4), (7) and (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 in an application for condonation 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. In my view, the bolded words in the above quoted Rule 3 of GN. No. 67 of 2007 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 including application for condonation. 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. I should also point out at this stage that 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.

I should also point out the obvious that, in an application for condonation, an applicant seeks the court or CMA to extend a helping hand of jurisdiction to the applicant otherwise the court or CMA will have no jurisdiction to determine the matter. In short, condonation goes to the jurisdiction. In the application at hand, when condonation was granted by the mediator, the same mediator proceeded to mediate the parties and issued a none-settlement certificate (CMA F8) as provided

for under Rule 13(4) of GN. No. 67 of 2007 (supra). In my view, clothing 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. I am of that view because mediation is rooted in confidence of the parties to the mediator, which is why, the mediator 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. I am of



the considered opinion that, any decision made by the Mediator on legal issue raised by either parties or the grant of an application for condonation erodes confidence of one of the parties to mediation, leading to failed mediation. In the application at hand, the order of the Mediator granting condonation 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 also 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 including but not limited to the application for condonation. In short, the Mediator had no power to either grant condonation or to dismiss the application for condonation.

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)*

This court held in the case of [Ndovu Resources Limited vs Thierry Murcia, Rev. Appl. No. 371 of 2022](#) that mediator has no power to grant an application for condonation. Since the Mediator had no powers to decide whether the application for condonation be granted or not, I hold that condonation was improperly granted and subsequent proceedings were improper.

It was submitted by counsel for the applicant that CMA proceedings should be nullified, the award arising therefrom be quashed and set aside and remit the file to CMA for condonation to be properly heard. On the other hand, counsel for the respondent was of the view that the court should invoke overriding objective principles and proceed to determine the matter. With due respect to counsel for the respondent, that invitation is not proper because condonation is rooted to jurisdiction. Overriding objective principles cannot be invoked when there is a jurisdictional issue.

For the foregoing, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom and remit the file to CMA so that

the application for condonation can be heard by the arbitrator and the mediator conduct mediation and if mediation fail, the mediator should refer the dispute to the arbitrator for arbitration.

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



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

Ruling delivered on this 28<sup>th</sup> February 2023 in chambers in the presence of Chali Juma, Advocate holding brief of Paschal Kamala, Advocate for the Applicant and Maunda Raphael, Advocate for the Respondent.



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