

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

**LABOUR REVISION NO. 238 OF 2022**

**NMB BANK PLC..... APPLICANT**

**VERSUS**

**MKANDE ZAWADI MBWAMBO..... RESPONDENT**

*(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala  
**Mwatanga: Mediator** dated 31<sup>st</sup> May 2022 in Labour Dispute No.  
CMA/DSM/ILA/148/2022)*

**JUDGEMENT**

**K. T. R. MTEULE, J**

**6th February 2023 & 6th February 2023**

Aggrieved by the ruling of the Commission for Mediation and Arbitration of Dar es Salaam, Ilala [herein after referred to as CMA], the applicant has filed this application under **Sections 91(I)(a)(b), and (2)(b), (4)(a) and 94(I)(b)(i) of the Employment and Labour Relations Act No. 6 [CAP 366 R.E 2019]; Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(I)(c)(d) and (e) of the Labour Court Rules, GN No. 106 of 2007** and any other enabling provisions of the law, praying for the Orders in the following terms:-

1. That, the Honorable Court be pleased to call for the records and examine the proceedings of the Commission for Mediation



and Arbitration in Labour Dispute No. CMA/DSM/ILA/148/2022 delivered by Hon. Mwangata Makawa, Mediator with a view of satisfying itself as to the legality, propriety, rationality and correctness thereof.

2. That the Honorable Court be pleased to revise and set aside the Commission for Mediation and Arbitration Ruling in CMA/DSM/ILA/148/2022 delivered by Hon. Mwangata Makawa, Mediator.

At this point I find it worth, to offer a brief sequence of facts leading to this application as extracted from CMA record, applicant's affidavit and the respondent's counter affidavit. The applicant was an employee of the respondent. On 27<sup>th</sup> January 2020 their relationship turned sour when it was alleged by the respondent that she was working under severe distress. Being uncomfortable with the working conditions, on 18<sup>th</sup> March 2022 the respondent referred the matter to the Commission claiming for TZS 120,000,000/= . At mediation stage the matter was withdrawn by the respondent's request on the reason that he had no further intention of continuing with it. At the time of withdrawal, there was a preliminary objection raised by the applicant to challenge the timeliness of the matter. Thinking that the matter should not have been withdrawn before the consideration of their Preliminary objection, the applicant was aggrieved by the ruling, hence filed this application.

Along with the Chamber summons supporting the application the affidavit of **Sharifa Karanda**, the applicant's Principal Officer was filed, in which after elucidating the chronological events leading to this application as already stated above, the applicant alleged that the mediator considered the applicants preliminary objection in the CMA and found the matter to be time barred but instead of dismissing it, the mediator struck it out. According to the deponent of the affidavit, the CMA erred in law for striking out the matter.

The applicant advanced two legal issue of revision as stated in his affidavit. The two issues seems to form one issue as to whether it was proper for the mediator to strike out the matter which is time barred instead of dismissing it.

In the respondent's counter affidavit, the allegation that the preliminary objection was considered and decided by the CMA on 31<sup>st</sup> May 2022 was vehemently disputed. According to the counter affidavit, on 2<sup>nd</sup> May 2022, the matter was fixed for mediation but on that material date the complainant who is the instant respondent prayed for the withdrawal of the matter for having no further intention to pursue it. Further contents of the counter affidavit avers that the respondent was served with the notice preliminary objection later on 2 May 2022 after the withdrawal order and that the said notice of preliminary objection was filed same

day of 2<sup>nd</sup> May 2022. The respondent denied any material irregularity in the Ruling of the mediator.

The Court ordered for the hearing of this matter to proceed by way of written submissions following the parties' prayer on 9<sup>th</sup> November 2022. Parties enjoyed legal services where the applicant was represented by Mr. Sabas Shayo, Advocate, while the Respondent was represented by Mr. Patrick Mhina, Advocate. I thank both counsels for complying with the Court's schedule in filing their submissions and for their industrious works in arguing the matter.

Arguing in support of the application Mr. Shayo submitted that, in challenging the competence of the dispute in the CMA, on 2<sup>nd</sup> May 2022 the applicant herein raised a preliminary objection to the effect that the matter before the CMA was time barred. On the other hand the respondent prayed to withdraw the dispute a prayer which was objected because it would defeat the purpose of preliminary objection and it would allow the respondent to file a fresh dispute which in essence will allow a dispute which was already time barred to be filed afresh but on 31<sup>st</sup> May 2022 the Commission for Mediation and Arbitration (CMA) delivered a Ruling striking out the matter instead of dismissing it while knowing that the matter before it was time barred.

According to Mr. Shayo, the respondent in his CMA Form No.1 indicated that the dispute arose on 27<sup>th</sup> January 2022, but it was filed at CMA on 18<sup>th</sup> March 2022 which means that there was a delay of 2 years. In such circumstances he is of the view that the matter was time barred and it ought to be dismissed and not struck out. Mr. Shayo thus prayed for the matter to be revised and set aside.

Opposing the issue as to whether it was proper for the mediator to strike out the dispute, Mr. Patrick submitted that the respondent was the first to move the Commission and prayed for the matter to be withdrawn for having no further intention of proceeding with it and this was before the preliminary objection came to the attention of the CMA. According to Mr. Patrick, by the time the respondent prayed for the matter to be withdrawn from the CMA, neither the Mediator nor the respondent was aware of the existence of the said preliminary objection. He stated that the issue of preliminary objection followed thereafter, even though the applicant served the respondent with the copy after completion of the submission before the Mediator. Supporting his stand, he cited two cases including the case of **Suzan Manyawa v. Cardinal Rugambwa Hospital**, Revision Application No.191 of 2022, High Court of Tanzania, Labour Division, at Dar es salaam, (unreported) where the court maintained that the remedy for an incompetent application is striking

out and not dismissal. He thus prayed for the application to be dismissed.

The Respondent lodged a rejoinder in which he stated that the preliminary objection was in the CMA record on 2<sup>nd</sup> May when the matter was disposed of and if not so, then the mediator should have stated otherwise. Other points raised in the rejoinder are duly taken into account in addressing this matter although there are some new issues which for interest of justice will not be looked at because the other party is not afforded with opportunity to respond.

Guided by the submissions made by both parties, the applicant's affidavit, the Respondent counter affidavit, and CMA record, I draw up one issue for determination which is **whether the applicant has provided sufficient ground for this Court to revise and set aside the CMA ruling.**

In approaching the above issue, I will address the issue in the affidavit as to **whether it was proper for the mediator to strike out the matter which is time barred.**

The applicant contended that the mediator erred in law for striking out the matter while there was a pending preliminary objection raised regarding timeliness of the disputed application.

On other side the respondent maintained that since the respondent was the first to move the Commission and prayed for the matter to be withdrawn as there was no intention of proceeding with it, he is of the view that the mediator was right to allow the withdrawal prayer and should not dismiss it.

Before going into the details of this matter, I wish to point out that I have gone through the CMA ruling and noted that contrary to what the applicant is trying to establish that the matter was struck out, I have noted that the dispute was withdrawn. This is vivid in the impugned ruling. The mediator considered the case laws submitted in the CMA by the applicant (**Standard Chartered Bank, Standard Chartered Hong Kong Limited versus VIP Engineering Marketing Limited and Standard Chartered Tanzania Limited, The Joint Liquidator of Mechmar Corp (Malasia) Berhad, Werisila Nederland B. Werisila Tanzania Limited, Civ. App Na. 222/2016, C.A.T at Dar es Salaam and Mary John Mitchell versus Silvester Magembe Chayo and Others, Civ. Appl. No. 161 of 2008, C.A.T at Dar es Salaam**) and distinguished them from the instant case. In her view, in the cited cases the Court struck out the matter while in the instant matter the order is for withdrawal.

Further, contrary to what the applicant alleged in the affidavit that the mediator considered the preliminary objection and found the matter to be time barred, the matter was withdrawn due to the complainant's prayer.

As to whether the withdrawal was properly executed while there was a preliminary objection, I agree with the applicant that it is a well known procedure that a preliminary objection must be determined first before the main suit or application. This principle was so stated in the case of **Thabit Ramadhan Maziku and another vs Amina Khamis Tyela and another**, Civil Appeal No. 98 of 2021 at page 4 where it also cited the case of **Bank of Tanzania Ltd V. Devran P. Valambia**, Civil Application No 15 of 2002 (CAT) (unreported) where the Court held: -

*"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily."*

Although the above authority insist that a preliminary objection has to be addressed first before going into the merits of the application, in this application the situation is different. In the CMA, the applicant prayed to withdraw the matter at the initial stage of mediation. This means the application was not set for determination on merits. This distinguishes it

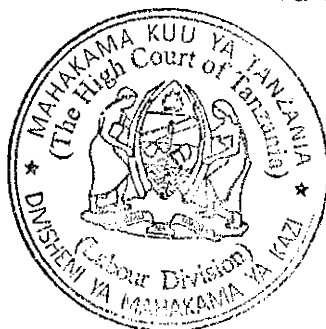


from the case laws cited by the applicant where the court's jurisdiction was already seized for the matters to be heard on merit. I could not see the better order which could have been issued at the mediation stage other than to allow the withdrawal of the case when so requested by the one who brought it. The applicant has an opportunity to rise the issue of time if the applicant refiles the case. Otherwise, it would be absurd to return the matter back to the mediation while the initiator of the dispute is not interested any longer to proceed with its merit.

Therefore, it is my considered view that the mediator was right to allow the withdrawal of the matter since there was no intention of proceeding with it. It is my finding that the first issue is answered negatively that no sufficient grounds established to warrant interference with the decision of the CMA. For that reason, the application for revision lacks merits.

On the above reasoning I hereby uphold the CMA ruling and disallow this application. Each party to take care of its own cost. It is so ordered.

Dated at Dar es salaam this 06<sup>th</sup> Day of February 2023.



**KATARINA REVOCATI MTEULE**

**JUDGE**

**06/02/2023**