

IN THE HIGH COURT OF TANZANIA

**LABOUR DIVISION
AT DAR ES SALAAM**

REVISION APPLICATION NO. 41 OF 2023

(Arising from the Ruling delivered on 29/12/2022 by Hon. Ngalika, E, Mediator, in Labour Dispute No. CMA/DSM/TMK/188/2022 at Temeke)

LUCAS ABEL BUMELA AND ANOTHER APPLICANT

VERSUS

CRC GROUPE LTD K.N.Y DESERT EAGLE HOTEL RESPONDENT

JUDGMENT

*Date of last order: 17/05/2023
Date of Judgment: 31/05/2023*

B. E. K. Mganga, J.

This Revision stems from the Ruling of the Commission for Mediation and Arbitration (CMA) at Temeke in Labour Dispute No. CMA/DSM/TMK/188/2022. Historical background of this application are that, on 08th March 2016, CRC Groupe Ltd on behalf of Desert Eagle Hotel, the herein respondent, employed Lucas Abel Bumela and Gasper Solomon Macheo, the herein applicants as Bartender and Hotel attendant respectively. The parties maintained their employment relationship until on 02nd March 2022 when respondent terminated employment of the applicants. Aggrieved with that termination, applicants referred the dispute at CMA complaining that they were unfairly terminated. On 6th April 2022, respondent raised a preliminary

objection that applicants sued a wrong person who is not their employer. On 20th May 2022, Hon. Ngalika. E, Mediator having heard submissions from the parties, delivered a ruling overruling the preliminary objection on ground that the said preliminary objection does not qualify to be a preliminary objection because it required evidence from the parties. The mediator reached that position because in arguing the said preliminary objection, applicants filed a copy of employment contract which they alleged respondent unfairly terminated but respondent disputed that contract. That notwithstanding, the mediator allowed applicants to withdraw the application as they prayed to rectify typing errors in the name of the respondent and allowed applicants to refile another dispute.

On 31st May 2022, applicants filed another referral form (CMA F1) together with an application for condonation (CMA F1) so that they can file a dispute against the respondent. On 10th June 2022, respondent filed the counter affidavit and a notice of preliminary objection that (i) the affidavit in support of the application for condonation is defective and (ii) applicant has sued a wrong person who is not their employer. At the time of hearing of the aforementioned preliminary objections, counsel for the respondent abandoned the first preliminary objection and argued only the second one relating to suing a wrong person. On

10th October 2022, Hon. Ngalika, Mediator, in his ruling, overruled the preliminary objection holding as he did on 20th May 2022 that the said preliminary objection required proof by evidence. Having so held, the Mediator, ordered the parties to appear before him on 18th October 2022 for hearing the application for condonation. On 18th October 2022 respondent did not enter appearance as a result, hearing was adjourned to 25th October 2022. On the later date, the parties agreed to dispose the application by way of written submission and the order was issued by the mediator to that effect. The parties complied with submission order. On 29th December 2022, Hon. Ngalika. E, mediator, delivered a ruling dismissing the application for condonation filed by the applicants. In the said ruling, the mediator held that there is no likelihood of the applicants to succeed in the dispute because it is unknown as who was their employer between CRC Group and Desert Eagles Hotel.

Applicants were aggrieved by the said ruling hence this revision application. In their joint affidavit, applicants raised two grounds namely:-

- 1. That, the arbitrator erred in law and fact to dismiss the application for condonation while applicants adduced good grounds for the delay.*
- 2. That, the arbitrator erred in law and fact in holding that applicants have a very low chance of success while that was supposed to be determined in the main dispute.*

In opposing the application, respondent filed a counter affidavit of Magreth Peter Kimario, her Managing Director.

When the application was called on for hearing, Edward Simkoko, from TASIWU, a Trade Union, appeared and argued for and on behalf of the applicants while Mariam Shellimoh, Advocate, appeared, and argued for and on behalf of the respondent.

Arguing in support of the application, Mr. Simkoko submitted that the applicants adduced good reasons sufficient for condonation to be granted because initially they filed the dispute within time but respondent raised a preliminary objection that applicants filed a dispute against a wrong person. He argued further that, on 25th May 2022, the dispute was struck out after upholding the preliminary objection raised by the respondent. Mr. Simkoko added that, on 31st May 2022, applicants filed a new dispute with an application for condonation but the mediator (Hon. Ngalika, E) dismissed it.

During submissions, the court *suo motto* raised a jurisdiction issue namely whether the mediator has jurisdiction to issue the impugned ruling and asked the parties to make submissions thereof.

Responding to the issue raised by the court, Mr. Simkoko, for the applicants submitted that, the Mediator has no power to hear and determine an application for condonation. Briefly as he was and without

citing any authority, he prayed CMA proceedings be nullified, quash the said ruling and order the application for condonation be heard properly at CMA by a competent arbitrator.

Ms. Shellimoh, advocate for the respondent, submitted that, the mediator has powers to hear and determine an application for condonation. In cementing her stance, counsel referred this court to the case of *Ngorongoro Conservation Area Authority v. Amiyo Tlaa Amiyo & Another*, Revision No. 28 of 2019, HC (unreported). Counsel further submitted that, condonation was properly heard and dismissed because there were no good reasons for the delay. In her submissions, counsel for the respondent conceded that, initially applicants filed the dispute within time but the same was struck out after respondent had raised a preliminary objection. Counsel argued that, applicants were supposed to account for each day of the delay and cemented her position by citing the case of *Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania*, Civil Application No. 2 of 2010 CAT (unreported). Counsel concluded that applicants did not convince the Court on whether there was likelihood of success and prayed the application be dismissed.

In disposing this application, I will start with the jurisdictional issue raised *suo motto* by the court. It is undisputed by the parties that all CMA rulings in this were delivered by Hon. Ngalika. E, Mediator. It was submitted by Mr. Simkoko on behalf of the applicants that the said mediator had no jurisdiction to issue those rulings but Ms. Shellimoh, counsel for the respondent submitted that the mediator has jurisdiction.

In answering the issue raised hereinabove, I find it useful to substantiate the legal position as to the powers of the mediator in relation to what was done in the application at hand. I find it useful to make reference in 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*) which 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).

It is my considered view that, 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 authority, 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."

The quoted provision is clear, in my view, in relation to the duties and powers of mediators. In fact, Brooke LJ, in the case of *Dunnett v Railtrack plc (in railway administration)* [2002] 2 All ER 850 pointed out how some litigants misunderstand the purpose of mediation and cemented on the role of mediators by stating: -

*"Mr. Lord, when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. **Skilled mediators are now able to achieve results satisfactory to***

both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide.”(Emphasis is mine)

I associate myself with that reasoning especially the bolded words and find that they are instructive in interpretation of the powers of the mediators in our labour statutes. It is my view that, the narrated facts of the application at and suggests that the mediator was helping the parties to resolve their grievances. It is clear from the above narrated facts of this application that at the end, parties did not shake hand rather, they were involved in adjudication process by raising legal issues that in one way or the other blocked the way of one of them.

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.

Furthermore, 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 only 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 CMA to extend a helping hand of jurisdiction to the applicant otherwise CMA will have no jurisdiction to determine the matter. In short, condonation goes to the jurisdiction.

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 refusing 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. I am aware that there are conflicting decisions of this court in relation to the powers of the mediators to grant an application for condonation. One of those cases is the case of [Rui Wang vs Eminence Consulting \(T\) Ltd](#) (Revision Application No. 306 of 2022) [2023] TZhCLD 1128. On the other hand, other decisions of this court shows that mediators have no power to hear and grant the application

for condonation. One of those cases is the case of [Nelson Mwaikaja vs Gemshad Ismail & Usangu General Traders](#) (Revs Appl No. 382 of 2022) [2023] TZHCLD 1. I have carefully read *Rui's case* (supra) and considering what was held in *Dunnett's case* (supra) and the above cited provisions of the law, I am of the view that mediators have no powers to grant condonation.

My afore conclusion is fortified by what was held by the court of Appeal in the case of *Barclays Bank T. Limited vs AYYAM Matessa*, Civil Appeal No. 481 of 2020. In *Matessa's case* (supra), the Court of Appeal 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 is bound by the above decision of the Court of Appeal. Unfortunately, I have not come across with a decision of the Court of Appeal suggesting that mediators have powers beyond mediation save for exceptions provided under the law, of which, hearing and granting condonation is not among. Since the Mediator had no powers to decide whether the application for condonation be granted or not, I hold that condonation was improperly denied.

Since I have held hereinabove that the mediator had no power to issue the impugned ruling, I find that there is no need of discussing the grounds raised by the applicants because proceedings were a nullity and this court cannot waste time to deal with nullity.

For the foregoing, I hereby nullify CMA proceedings, quash and set aside the ruling arising therefrom and remit the file to CMA so the application for condonation can be heard by the arbitrator. If the application will be granted, then, the parties will be required to go to the mediator for mediation before going to the arbitration stage. If the application will not be granted, then, applicants if they will be still interested, they may file an application for revision before this court.

Dated at Dar es Salaam on this 31st May 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on 31st May 2023 in chambers in the presence of Edward Simkoko, from TASIWU, a Trade Union for the Applicants and Mariam Shellimoh, Advocate for the Respondent.



B. E. K. Mganga
JUDGE