

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 129 OF 2023

(Originating from the Ruling delivered on 03/05/2023 by Hon. Ngalika, E, Mediator, in Labour Dispute No. CMA/DSM/TMK/122/2023, ta Temeke)

EMMA HEALTH CENTRE AND PILLS AND

ADDAM MEMORIAL COMPANY LIMITED..... APPLICANT

VERSUS

NEEMA LEWIS MDOE AND SIX OTHERS RESPONDENTS

JUDGMENT

*Date of last order: 18/07/2023
Date of judgment: 11/08/2023*

B. E. K. Mganga, J.

It is said that applicants had employment contract with the respondents and that on 13th March 2022, applicants terminated employment of the respondents. Respondents were aggrieved with termination of their employment, as a result, they filed Labour dispute No. CMA/DSM/TMK/122/2023 at Temeke complaining that they were unfairly terminated. Being out of time, respondents filed an application for condonation. On 3rd May 2023 Hon. Ngalika, E, Mediator, having

considered evidence of the parties in the affidavit and the counter affidavit and submissions thereof, granted condonation on ground that the delay was technical and not actual.

Applicants were aggrieved by the said ruling hence this application for revision. In support of the application, applicants filed the affidavit affirmed by Salum Mpenda, their Principal Officer containing three grounds.

On the other hand, respondents filed the Notice of Opposition and the counter affidavit sworn by Neema Lewis Mdoe on behalf of six others.

When the application was called on for hearing, Mr. Hussein Msekwa, learned counsel appeared for and on behalf of the applicants while Mr. Lusekelo Samson, Personal Representative appeared for and on behalf of the respondents.

Arguing in support of the application, Mr. Msekwa submitted that, the mediator has no power to grant condonation because application for condonation involves legal issues that are reserved for determination by arbitrators. In support of his argument, counsel for the applicants cited the case of ***Tanzania Cigarette Public Ltd Company v. Nancy***

Mathew Kombe, Revision application No. 421 of 2022, HC(Unreported). Counsel for the applicants submitted further that, mediation is rooted in confidence of the parties to the mediator. He added that, that confidence is affected when the mediator determines an application for condonation. Counsel for the applicants concluded by praying that, the CMA proceedings be nullified and order an application for condonation be heard by the arbitrator.

On the other hand, Mr. Lusekelo, personal representative of the respondents concurred with submissions by counsel for the applicants that the application for condonation was heard and determined by the mediator who has not power to grant condonation. He also concurred with the prayer to nullify CMA proceedings and order the application be heard *de novo* by the arbitrator.

I have examined the CMA record and find that, the application for condonation was heard and determined by the mediator who, finally granted the order of condonation. It is true that, in an application for condonation, CMA is called to extend its helping hand in two folds. One; by granting condonation, CMA extends its helping hand by clothing itself with jurisdiction that was taken away by the provisions of Rule 10(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules GN.

No. 64 of 2007. Two; by dismissing the application for condonation, CMA refuses to extend the same helping i.e., refuses to cloth itself with jurisdiction that was taken away by the afore cited Rule. See the case of [Tanzania Cigarette Public Ltd Co. vs. Nancy Mathew Kombe](#) (Rev. Appl 421 of 2022) [2023] TZHCLD 1138. I should put it clear that, the jurisdiction CMA is being asked to extend in an application for condonation is not territorial or geographical jurisdiction, which mediators may, simply decide or have power to determine under Rule 15 of the Labour Institutions (Mediation and Arbitrations) Rules, GN. No. 64 of 2007, which normally, does not involve legal issues or require use of discretion. See the case of [Benjamin Lazaro Isseme vs Yapi Merkezi Insaat Ve Sanayi Anonim Sirket](#) (Rev. Appl 26 of 2023) [2023] TZHCLD 1225. But in an application for condonation, CMA is being asked the one involving resolving legal issues by applying the law and discretion, which is why, in my view, mediators lacks jurisdiction as explained hereunder.

In an application for condonation, applicant must file CMA F2 supported by an affidavit stating reasons for the delay for the application to be granted as provided under Rule 29(1)(a) and (4)(d) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of

2007. If the other party objects the application, he or she must file the counter affidavit in terms of Rule 29(5) of GN. No. 64 of 2007 (supra). Once that is done, then, it becomes open for the arbitrator to consider evidence in both the affidavit and counter affidavit and make a decision thereof. I should point out that, in deciding whether to grant or refuse an application for condonation or extension of time, CMA must do so judiciously. See the case of ***Zaidi Baraka and 2 others v. Exim Bank (T) Limited, Misc. Commercial cause No. 300 of 2015***, CAT (unreported) and ***Mza RTC Trading Company Limited vs Export Trading Company Limited***, Civil Application No.12 of 2015 [2016] TZCA 12 wherein the Court of Appeal held:-

*"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 ...**"*

In fact, in order the application for condonation or extension of time to be granted, applicant must disclose reasons for the delay for the application to be granted. See the case of ***Regional Manager, Tanroads Kagera v. Ruaha Concrete Company Ltd***, Civil Application No. 96 of 2007, CAT (unreported). In short, granting or refusal to grant condonation cannot be made arbitrary. In my view,

determination of an application for condonation is adjudicatory and not mediation hence cannot be within the powers of the Mediator. I am of that view because, the role and powers of the Mediator is to mediate the parties that is to say; the role of the Mediator is to assist the parties to resolve the dispute as provided for under section 86(4), (7) and (8) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] and Rule 3(1) and (2) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No.67 of 2007. This court held in [Isseme's case](#) (supra) that, granting or dismissal of the application for condonation, cannot be a process of assisting the parties to amicably settle the dispute envisaged under the provisions of Rule 3(1) and (2) of GN. No. 67 of 2007 (supra). More so, Part II of GN. 67 of 2007 (supra) that relates to mediation process and the powers of the Mediator, does not give powers to the Mediator to determine legal issues including but not limited to determination of condonation. I am guided by the decision of the Court of Appeal in the case of [Zaidi Baraka & Others vs Exim Bank Tanzania Limited](#) (Civil Appeal No. 194 of 2016) [2020] TZCA 1933 wherein it was held that limitation of time is a legal issue. It is my opinion therefore that, determination of application for condonation involves determination of legal issues that has nothing to do with the mandate of mediators to help the parties to amicably settle the dispute.

In the case of [Barclays Bank T. Limited vs AYYAM Matessa](#), Civil Appeal No. 481 of 2020 [2022] TZCA 189, the Court of Appeal had an advantage of discussing the powers of the Mediator and held *inter-alia*:-

"...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)

As pointed out hereinabove, the application for condonation does not fall in exceptional powers of the Mediator under our laws.

It was correctly submitted by counsel for the applicants that mediation is based on confidence of the parties to the mediator and that the said confidence is eroded after the same mediator has heard and determined an application for condonation. I entirely agree with him. It is my view that, meaningful mediation is done when the parties have confidence to the mediator. The drafters of Rule 8 of GN. No. 67 of 2007 (supra) had that in mind, which is why, rule 8(1) and 8(4) provides that mediation is confidential process and that, information obtained in mediation process should remain confidential. It is also my view that, to allow mediators to hear and determine an application for condonation, is

to erode confidence of the parties to the mediators and destroy the whole purpose of mediation process. The effect thereof is that, many disputants will go to mediation just to comply with the law and not with good intention to settle the dispute. It is my view that, let us restore confidence of the disputants to the mediators by allowing only mediators to do what they are permitted under the law. If that is properly done, then, mediators may settle disputes within a short span of time and allow the parties to go home happily unlike to arbitration process that consumes money and time of both the parties and the arbitrator, but the winner takes all.

Guided 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 [2022] TZCA 189 and what was held by this court in the case of [Nelson Mwaikaja vs Gemshad Ismail & Usangu General Traders](#) (Revs Appl No. 382 of 2022) [2023] TZHCLD 1, [Lucas Abel Bumela and Another vs CRC Groupe Ltd K.N.Y Desert Eagle Hotel](#) (Revision Application No. 41 of 2023) [2023] TZHCLD 1294, [Benjamin Lazaro Isseme vs Yapi Merkezi Insaat Ve Sanayi Anonim Sirket](#) (Rev. Appl 26 of 2023) [2023] TZHCLD 1225 and [Tanzania Cigarette Public Ltd Co. vs. Nancy Mathew Kombe](#) (Rev. Appl 421 of 2022)

[2023] TZHCLD 1138 to mention but a few, I hold that the mediator had no power to determine an application for condonation filed by the respondents. I therefore agree with submissions made on behalf of the parties, nullify CMA proceedings, quash and set aside the ruling grant condonation and order that the parties should go back to CMA so that the application for condonation can be properly heard by the arbitrator.

Dated at Dar es Salaam on this 11th August 2023.



B. E. K. Mganga

JUDGE

Judgment delivered on 11th August 2023 in chambers in the presence of Lusekelo Samson, the Personal representative of the Respondents but in the absence of the Applicant.



B. E. K. Mganga

JUDGE

