

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 184 OF 2023

(Arising from a Ruling issued on 12/07/2023 by Hon. Mvungi, H. A Mediator, in Labour Dispute No. CMA/DSM/KIN/617/2023 at Kinondoni)

TANZANIA NORDIC HOSPITAL & ANOTHER APPLICANTS

VERSUS

LEMNA JANUARY HENJEWELE & 2 OTHERS RESPONDENTS

RULING

Date of last Order: 07/09/2023

Date of Ruling: 12/09/2023

B. E. K. Mganga, J.

It is undisputed by the parties that Lemna January Henjewe, Loveness Kulanga and Omary Abdul, the 1st, 2nd and 3rd respondents filed Labour dispute No. CMA/DSM/KIN/617/2023 before the Commission for Mediation and Arbitration (CMA) at Kinondoni against Tanzania Nordic Hospital and Dr. Frateline Kashanga, the 1st and 2nd applicants respectively relating to non- payment of salary. It is also undisputed that, while the dispute was at mediation stage, applicants raised three preliminary objections namely, (i) that the commission has no jurisdiction to determine the dispute because respondents were not

her employees, (ii) respondents were working with volunteers and not with the applicant, and (iii) that, National Health Workforce Volunteering Guideline of 2021 provides dispute settlement mechanism.

On 12th July 2023, Hon. Mvungi, H.A, Mediator, having heard respective submissions from both sides, issued a ruling dismissing the preliminary objections raised by the applicants. In the said ruling, the Mediator stated *inter-alia* that the alleged preliminary objection requires evidence to be proved. Having dismissed the preliminary objections raised by the herein applicants, the mediator issued an order that she continue to mediate the parties.

Applicants were aggrieved with the said ruling dismissing their preliminary objections hence this application for revision. In the affidavit sworn by Dr. Frateline Kashaga, the Executive Director of the 1st applicant who is also the 2nd applicant, raised four grounds namely: -

1. *That, the arbitrator misdirected herself and failed to appreciate legal arguments advanced by the applicant on jurisdiction of CMA.*
2. *That, the arbitrator misdirected herself and failed to note that the dispute was filed prematurely.*
3. *That, the arbitrator misdirected herself and failed to appreciate that the preliminary objections were touching CMA jurisdiction.*
4. *That the arbitrator misbehaved by acting illogical, frivolously and vexatiously while preparing the ruling on 12th July 2023.*

Respondents filed both the Notice of Opposition and the Counter affidavit sworn by Lemna January Henjewe, the 1st respondent resisting the application.

When the application was called on for hearing on 7th September 2023, applicants were represented by Deusdedith Jovin Kahangwa, the Human Resources Manager of the 1st applicant for the applicants while respondents were represented by Waziri Hemed, Personal Representative.

Before the parties has conversed on the grounds raised by the applicants, I perused the CMA record and find that the Ruling that is the subject of this application was issued by the Mediator and not the arbitrator. With those observations, I asked the parties to address the court whether, the mediator had powers to issue the impugned ruling or not.

Responding to the issue raised by the court, Mr. Kahangwa, for the applicants submitted that, the mediator had powers to issue the impugned ruling because at first, when the dispute is received at CMA, it must be satisfied whether, it is a labour issue or not. He submitted further that, that is what was done by the mediator. He added that, in terms of Rule 15 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007, mediators has powers to determine

jurisdictional issues. When probed by the court on the issue, whether, respondents were or were not employees of the applicant is a jurisdictional issue, he bluntly unashamedly submitted that it is. In the same submissions, Mr. Kahangwa conceded that, the issue whether respondents were employees of the applicants required evidence and that, mediator does not receive/hear evidence of the parties. He submitted further that, the duty of the mediator is to assist the parties to resolve the issue/dispute amicably.

When further probed by the court as to whether, the ruling by the mediator finalized the dispute between the parties, Mr. Kahangwa, readily conceded that it did not. He submitted further that, the said ruling is an interlocutory, hence, in terms of Rule 50 of the Labour Court Rules, GN. No. 106 of 2007, it is not subject to revision. He concluded his submissions that, applicants were not supposed to file this application.

Responding to the issue raised by the court, Mr. Hemedi submitted that the mediator had no power to issue the impugned ruling. He submitted further that; the Mediator was supposed only to assist the parties to settle the dispute. He added that, the ruling is null and void because the mediator had no such powers. Mr. Hemedi submitted

further that, the order was interlocutory not subject to revision. He concluded his submissions praying the court to revise the CMA ruling.

Having heard submissions of the parties, I find that, it was correctly submitted by the parties that the impugned ruling was interlocutory as it did not finalize the dispute between the parties hence not subject to revision in terms of Rule 50 of the Labour Court Rules, GN. No. 106 of 2007. Therefore, applicants were not supposed to file this application.

There is no dispute that the impugned ruling was issued by the mediator though in the affidavit in support of this application, applicants indicated that it was delivered by the arbitrator. During hearing, both parties agreed that the impugned ruling was issued by the Mediator and not the arbitrator. In fact, the ruling attached to this application shows that it was issued by Hon. Mvungi, H.A, Mediator. Therefore, it was just a slip of pen for the applicants to show in the affidavit in support of this application that the impugned ruling was issued by the arbitrator.

It was correctly, in my view, submitted by the parties that, the duty of the mediator is to assist the parties to amicably settle the dispute. Indeed, that is the dictate of the provisions of section 86(4), (7), (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. In fact, 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."*
(Emphasis is mine).

It is my view that, in hearing the parties on submissions made in respect of the preliminary objections raised by the applicants and finally delivering a ruling thereof, cannot be said that the mediator was assisting the parties to resolve the dispute through discussions 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, tells all. This court has

took a similar position in the case of *Lucas Abel Bumela and Another vs CRC Groupe Ltd K.N.Y Desert Eagle Hotel* (Revision Application No. 41 of 2023) [2023] TZHCLD 1294 and *Nelson Mwaikaja vs Gemshad Ismail & Usangu General Traders* (Revs Appl No. 382 of 2022) [2023] TZHCLD 1. I therefore hold that the mediator had no power to issue the impugned ruling. Since the mediator had no power to issue the impugned ruling, I hereby nullify CMA proceedings, quash, and set aside the said ruling and direct the parties to go back to CMA so that the preliminary objections raised by the applicants can be heard and determined by the arbitrator.

Dated at Dar es Salaam on this 12th September 2023.



B. E. K. Mganga
JUDGE

Ruling delivered on 12th September 2023 in chambers in the presence of Deusdedith Jovin Kahangwa, the Human Resources Officer of the 1st Applicant on behalf of the Applicants and Waziri Hemedi, Personal Representative of the Respondents.



B. E. K. Mganga
JUDGE

