

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION APPLICATION NO. 182 OF 2023

(Arising from an Award issued on 27/06/2023 by Hon. E. Tibenda, Arbitrator, in Labour dispute No. CMA/DSM/PWN/KBH/027/2020 at Kibaha)

KINASI LIMITED APPLICANT

VERSUS

JUMA JAFFARI RESPONDENT

RULING

Date of last Order: 20/09/2023
Date of Ruling: 27/09/2023

B.E.K. Mganga, J.

Brief facts of this application are that, on 18th February 2019, Juma Jaffari, the herein respondent filed Labour complaint No. CMA/DSM/PWN/KBH/027/2020 before the Commission for Mediation and Arbitration henceforth CMA at Kibaha against Kinasi Limited, the herein applicant. On the nature of the dispute, respondent indicated in the Referral Form (CMA F1) that it was termination of employment and breach of contract. Respondent further indicated that the dispute arose on 15th August 2019. On procedural fairness, respondent indicated in the said CMA F1 that applicant breached the contract of employment and its

terms. On substantive fairness, respondent indicated that either party ought to have issued a 60 days' notice before termination as per the terms of the contract of employment.

Being aware that he was out of time, applicant also filed an application for condonation (CMA F2) supported by his affidavit he affirmed on 11th February 2020 before Levis Basiley Lyimo, advocate and Commissioner for Oaths. On degree of lateness, respondent indicated in the said CMA F2 that, he was late for six (6) months. On reasons for lateness, respondent indicated that the employer (the herein applicant) promised to call him at any time and that he was called twice for specific task and thereafter he was not called.

Respondent filed the counter affidavit sworn by Peter Victor Byrne, her managing director to oppose the application for condonation. In the said counter affidavit, the deponent stated *inter-alia* that, employment relationship between the parties ended by mutual agreement in August 2019 and that, the parties agreed to establish new employment relationship as and when required. It was further stated that, there was no reasons to justify condonation to be granted.

On 17th March 2020, Hon. Joyce Christopher Lyimo, Mediator, having considered evidence in both the affidavit and the counter affidavit and submissions made on behalf of the parties, issued a ruling

that the herein applicant was supposed to reduce the alleged mutual agreement into writing and that, since respondent was called to work for specific task waiting to be served with termination letter, then, respondent's delay to file the dispute was justifiable. The Hon. Mediator therefore granted condonation.

Having granted the application for condonation, the parties appeared before the same mediator (Hon. Lyimo) for mediation. On 12th May 2020, Rancy Mhaya, advocate for the herein applicant and Yusuph Mathias, advocate for the herein respondent, appeared before Hon. Joyce Lyimo, Mediator, and signed the Certificate of non-settlement (CMA F6) that mediation failed. The said CMA F6 was also signed by Hon. Joyce Lyimo, Mediator. After failure of mediation, on the same date, the herein respondent filed the Notice to refer a dispute to arbitration (CMA F8).

On 27th June 2023, Hon. E. Tibenda, arbitrator, issued an exparte award that applicant breached the contract and unfairly terminated the respondent. The arbitrator therefore awarded respondent to be paid a total of TZS 14,950,000/=.

Applicant was aggrieved by the said award hence this application for revision. Applicant also filed the affidavit of Mafuru Mafuru, advocate to support the Notice of Application. On the other hand, respondent filed

both the Notice of Opposition and his counter affidavit to oppose the application.

When the application was called on for hearing, applicant was respondent by Mr. Mafuru Mafuru, learned advocate while respondent was represented by Mr. Yusuph Mathias, learned advocate.

Before allowing the parties to submit on the grounds raised by the applicant, I perused the CMA record and find that in the CMA F1, respondent indicated that the nature of the dispute was termination and breach of contract. I also noted as pointed hereinabove that, the ruling granting condonation was issued by the mediator. Further to that, I noted that the dispute that was mediated is termination but all issues that were drafted by the arbitrator and the parties relates only on breach of contract. With those observations, I asked both learned counsel to address the court (1) whether the mediator had powers to grant condonation in favour of the respondent, (2) whether CMA F1 was properly filed, (3) whether issues were properly drafted, (4) whether it was proper for the arbitrator to hear and determine the dispute of breach of contract while the same was not mediated and (5) what is the effect thereof.

Responding to the issue relating to the power of the mediator, Mr. Mafuru, learned counsel for the applicant, submitted that mediator had

power to grant condonation. He added that, the mediator entertained the application for condonation while the duty of the mediator is to assist the parties to resolve the dispute as provided for under section 86(4), (7), (8) of the Employment and Labour Relation Act [Cap. 366 RE. 2019] and Rule 3(1) and (2) of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007. To cement on his submissions, learned counsel for the applicant cited the case of ***Nelson Mwaikaja v. Gemshad Ismail & Usangu General Traders***, Revision No. 382 of 2022, HC (unreported) and ***Barclays Bank (T) Ltd v. Ayyam Matessa***, Civil Appeal No. 481 of 2020, CAT (unreported). He submitted further that, an application for condonation involves legal issues which is not in the domain of the mediator.

On the 2nd, 3rd, 4th and 5th issues, learned counsel for the applicant submitted that, in CMA F1 respondent indicated that the dispute relates to termination and breach of contract. He submitted further that, the dispute that was supposed to be arbitrated is termination that was mediated and not breach of contract that was not mediated. He added that, Rule 22(2)(b) of Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 requires issues to be narrowed and that, issues must relate to the dispute. Mr. Mafuru submitted further that, it was improper for the arbitrator and the parties to draft issues

relating to breach of contract while the same was not mediated. Learned counsel for the applicant cited the case of ***Abel Edson Mwakanyamale v. NBC (1997) Ltd***, Civil Appeal No. 63 of 2003, CAT (unreported) to support his submission that failure to draft issues relating to the dispute is fatal and vitiates proceedings. He added that, in the application at hand, the arbitrator did not comply with the provisions of Rule 22(2)(b) of GN. No. 67 of 2007 (supra) and that, the omission was detrimental to the parties because issues relating to the dispute that was mediated were not determined. He concluded that, the irregularity is fatal and prayed the court to nullify CMA proceedings, quash and set aside the award arising therefrom and order trial *de novo*, subject to the law of limitation.

Responding to the issues raised by the court, Mr. Mathias, learned counsel for the respondent submitted that the mediator had no power to grant condonation. He added that, the dispute proceeded to the arbitration stage while CMA had no jurisdiction. Learned counsel for the respondent submitted further that, it was not proper for the arbitrator and the parties to draft issues relating to breach of contract while the dispute that was mediated is termination. He further submitted that, CMA F1 was not defective because, it is possible for the employee to indicate that the dispute is both on termination and breach of contract.

He concluded that based on lack of jurisdiction of the mediator and failure to mediate the dispute for breach of contract, the irregularity vitiated proceedings and prayed the court to nullify CMA proceedings, quash the award and order trial *de novo*.

I have considered submissions made on behalf of the parties and wish, in disposing this application, to start with the issue relating to powers of the mediator.

It was correctly, in my view, submitted by both counsel that, the mediator has no power to grant an application for condonation because the power of the mediator is only to assist the parties to resolve the dispute amicably. It is my view that, that is the dictate of the provisions of 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. 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 application for condonation and issue the ruling that went almost to the merit of the dispute, cannot be said that the mediator was assisting the parties to resolve the dispute amicably. I therefore agree with submissions by both counsel that the mediator’s powers are limited to assisting the parties to resolve the dispute amicably and does not include to determine legal issues including granting condonation. See the case of [*Barclays Bank T. Limited vs Ayyam Matessa*](#) (Civil Appeal 481 of 2020) [2022] TZCA 189, [*Nelson Mwaikaja vs Gemshad Ismail & Usangu General Traders*](#) (Revs Appl No. 382 of 2022) [2023] TZHCLD 1, [*Benjamin Lazaro Isseme vs Yapi Merkezi Insaat Ve Sanayi Anonim Sirket*](#) (Rev. Appl 26 of 2023) [2023] TZHCLD 1225, [*Tanzania Nordic Hospital & Another vs Lemna January Henjewele & 2 Others*](#) (Revision Application No. 184 of 2023) [2023] TZHCLD 1407, [*Wasafi FM Co. Ltd vs Kanky P. Mwaigomole*](#) (Revision No. 123 of 2023) [2023] TZHCLD 1405, [*HTT Infraco Limited vs Francis Kiaga*](#) (Revision Application No. 171 of 2023) [2023] TZHCLD 1418, [*Emma Health Centre and Pills and Addam Memorial Company Limited vs Neema Lewis Mdoe and 6 Others*](#) (Revision Application No. 129

of 2023) [2023] TZHCLD 1387 and [**Madonna Hospital Limited vs Tamali Stephano Mtengwa**](#) (Revision Application No. 155 of 2023; Revision Application No. 155 of 2023) [2023] TZHCLD 1398 to mention but a few. In the case of [**Barclays Bank T. Limited vs AYYAM Matessa**](#), Civil Appeal No. 481 of 2020 [2022] TZCA 189 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)

From the foregoing, it is my view that, condonation was improperly granted by the mediator as a result, the dispute proceeded to both mediation stage and arbitration while CMA had no jurisdiction. I am of that view because, in an application for condonation, the party is seeking the Commission to cloth itself with jurisdiction that it lacked due to expiry of period. In my view, since the Mediator had no jurisdiction to cloth the Commission with jurisdiction it lost due to expiry of time, then, the Commission was not clothed with jurisdiction. In short, the dispute proceeded both to mediation and arbitration stages while the

Commission having no jurisdiction. I therefore agree with counsel for the respondent that CMA had no jurisdiction.

More so, it was improper for Hon. Joyce Lyimo, the mediator, to issue the ruling granting condonation that almost went to the root of the main dispute and thereafter purport to mediate the parties. Assuming that the mediator had jurisdiction, of which she did not have, the mediator was not supposed in her ruling, to decide matters going to the root of the dispute. She was only supposed to hold that there are good reasons to warrant condonation and grant condonation and end there. Having issued a ruling that went to the root of the dispute and thereafter call the parties to mediation, in my view, led mediation process to be done just as formalities. I am of that view because at that time, it cannot be said that applicant had confidence in mediation process. I am of that view because, mediation is based on confidence of the parties to the mediator.

It is clear from the record and as was correctly submitted by the parties that, the dispute that was mediated is termination but issues that were drafted by the parties and the arbitrator relates to breach of contract. Based on those issues, the dispute that was arbitrated is breach of contract that was not mediated. In my view, that was

improper because Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 67 of 2007, provides that mediation is mandatory. It was not proper for the arbitrator to hear the dispute of breach of contract while the dispute that was mediated is only termination of employment. On several occasions, this court has held that, proceedings conducted in relation to the unmediated dispute is a nullity. See 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, [Nelson Mwaikaja vs Gemshad Ismail & Usangu General Traders](#) (Revs Appl No. 382 of 2022) [2023] TZHCLD 1, [Madonna Hospital Limited vs Tamali Stephano Mtengwa](#) (Revision Application No. 155 of 2023) [2023] TZHCLD 1398 and [HTT Infraco Limited vs Francis Kiaga](#) (Revision Application No. 171 of 2023) [2023] TZHCLD 1418. In [Mwaikaja's case](#) (supra) this court held: -

*"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."* (Emphasis is mine)

Again, since the dispute that was mediated is termination of employment only, it was improper for the parties to draft issues relating to breach of contract. As it was correctly submitted by counsel for the

applicant, there was violation of Rule 22(2)(b) and Rule 24 GN 67 of 2007 (supra) that requires issues to be narrowed and to relate to the dispute. It was, in my view, correctly submitted by counsel for the applicant, that, failure to draft issues properly vitiated the whole CMA proceedings. My position is fortified by what was held by the Court of Appeal in ***Mwakanyamale's case*** (supra) and ***Honourable Attorney General vs Reverend Christopher Mtikila*** (Civil Appeal 45 of 2009) [2010] TZCA 162 that omission to draft issues can be fatal if it resulted the parties to go to trial without knowing that the said question was in issue between them and therefore failed to adduce evidence on that point. In the application at hand, no issue was drafted relating to termination of employment of the respondent though the dispute that was mediated is termination. In my view, during arbitration, the parties forgot that the dispute also related to fairness of termination, as a result, no evidence relating to fairness of termination was adduced. In my view, that was fatal.

As pointed hereinabove, respondent filled part B of CMA F1 relating to fairness of termination only. On fairness of procedure, respondent indicated that: -

"the employer breached the contract and its terms therein."

On substantive fairness, respondent indicate that: -

"Either party ought to have issued a 60 days' Notice before termination as per the terms of the contract the same was not complied."

What respondent indicated in part B of the Referral Form (CMA F1) that relates to fairness of termination only, did not relate to fairness of termination, rather, it related to breach of contract. In my view, that made the said CMA F1 to be defective. Since CMA F1 is pleadings and was fatal, then, the whole dispute was incompetent. See the case of [Ngorongoro Conservation Area Authority vs Amiyo Tlaa Amiyo and Another](#) (Labour Revision Application 28 of 2019) [2022] TZHC 3078, See [Bosco Stephen vs Ng'amba Secondary School](#) (Revision 38 of 2017) [2020] TZHC 390, [Lancet Laboratories \(T\) Limited Versus Nelson Ng'ida](#) (Revision Application 369 of 2022) [2022] TZHCLD 1092 and [Dar Es Salaam International Academy vs Makiadu Ndosimau](#) (Revs Appl No. 310 of 2022) [2023] TZHCLD 1167.

For all what I have discussed hereinabove, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom and order the parties to go back to CMA so that the application for condonation can be properly heard and determined by the arbitrator subject to amendment of the CMA F1 and further subject to the

provisions of Rule 10(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007.

Dated at Dar es salaam this 27th September 2023



B. E. K. Mganga

JUDGE

Ruling delivered on 27th September 2023 in chambers in the presence of Ms. Sia Ngowi, Advocate for the Applicant and John Chogoro, Advocate, holding brief of Yusuph Mathias, Advocate for the Respondent.



B. E. K. Mganga

JUDGE