IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 223 OF 2023

BETWEEN

EXIM BANK TANZANIA LIMITED ..... APPLICANT

VERSUS

NORBERT DEOGRATIAS MISSANA ..... RESPONDENT

RULING

Date of last Order: *27/10/2023*
Date of Ruling: *09/11/2023*

MLYAMBINA. J.

In determining the application at hand, the Court will borrow the wisdom of the Court in the case of **Zella Adam Abrahaman & 2 Others v. The Hon. Attorney General & 8 Others,** Consolidated Civil Revision Nos. 1, 3 & 4 of 2016, Court of Appeal of Tanzania, Dar es Salaam (unreported) where it was stated that:

> It is religiously said, but we are not certain if it is sufficiently remembered, if at all, that ***"Justice delayed, is Justice denied."*** Conversely, conventional wisdom has it that 'Justice hurried, is Justice buried."
>
> Admittedly, these twin evils impede the smooth administration of what should be a credible justice system, and should, therefore, be roundly abhorred and eliminated. In our considered opinion, therefore, in any properly functioning or delivering justice system, the overriding vision should be to

avoid denying justice through unexplainable delays and/or sacrificing it at the altar of speed and expediency.

This ruling is in respect of the preliminary objection raised by the Respondent's representative herein against an application for revision of the ruling issued by the Commission for Mediation and Arbitration (herein CMA). Initially, the Respondent was the Applicant's employee. He was employed on 11/03/2011 as a Banking Officer. The employment of the Respondent was terminated on 26/11/2015 on the ground of gross negligence. That the Respondent breached the bank's standard operating procedures leading to monetary loss. The Respondent was also faced with a criminal case which was in relation to the misconduct in question. After completion of the Criminal case, on 05/05/2023, he referred the dispute of unfair termination at the CMA whereby such dispute was accompanied with an application for condonation.

On the reasons which are not relevant at this juncture, the Arbitrator condoned the delay and ordered the matter to proceed with the mediation stage. Such decision aggrieved the Applicant. He therefore filed this revision application. The application was strongly opposed by the Respondent through counter affidavit sworn by the Respondent himself. He further filed the notice of preliminary objections

with three points of objection. However, the two points were abandoned and the Respondent remained with the following only one point which is the subject matter of this ruling:

> *The Application is incompetent in that it has contravened and provision of rule 50 of the Labour Court Rules, 2007 G.N No. 106 of 2007.*

For easy of reference, the referred provision is to the effect that:

> No appeal, review or revision shall lie on interlocutory or incidental decisions or orders, unless such decision has the effect of finally determining the dispute.

The preliminary objection was argued by way of written submissions. The parties dully filed their submissions as ordered by the Court. The parties' submissions will be considered on board in due course of constructing this ruling.

Before the Court, the Applicant was represented by Mr. Philip Lincoln Irungu, learned counsel, while Mr. Paschal Temba, Personal Representative appeared on behalf of the Respondent.

As the record speaks, the application is for challenging the CMA's decision on grant of application for condonation. **There are two school of thought** in challenging the decision against grant of application for condonation at the CMA. The first school is of the view that; *where a*

complainant is granted condonation at the CMA, if such decision aggrieved the Respondent, he/she may file revision application before the Court. The profounder of that school maintains that the decision reached at the CMA on the grant of application for condonation is not interlocutory thus, can be challenged by way of revision. Such school is supported by the case of **Lucky Games Limited v. Salim Madati,** Revision Application No. 53 of 2023, High Court Labour Division at Dar es Salaam (unreported), p.12, cited by the Applicant's counsel where it was held that:

> I should point out that, in granting or dismissing the application for condonation, the main issue before the arbitrator is whether, Applicant had good cause or reason for delay. Once that issue is answered either in affirmative or negative, then, the application is decided to its finality. Nothing can be left for it to be said that the application has not been finally determined. If the application is dismissed, it is open to the Applicant to file an application for revision before this High Court and that is acceptable. The logic is simple, namely, the application was decided to its finality against the Applicant. As a matter of fact, if the application for condonation is decided against the Respondent, then, it is also decided to its finality. Therefore, Respondent had an option to file application for revision. To hold otherwise, in my view, is treating the parties in the same application with double standard namely, granting

the party who filed an application for condonation right to file revision but denying the same right to the Respondent.

The second school is of the view that; *the decision against the grant of condonation is interlocutory and it cannot be challenged by way of revision.* This stance is supported by the case of **MIC Tanzania Ltd v. Peter S. Mhando**, Revision No. 431 of 2022, High Court Labour Division, Dar es salaam (unreported) where it was held that:

> On that basis I am in agreement with Mr. Kitundu that the purpose of ruling that application for condonation is interlocutory is to avoid prolonged litigations. Being an interlocutory order, the Applicant's right to challenge the contested decision is reserved until final determination of the main application.

The same principle is also reflected in the cases of **Mohamed Enterprises (T) Ltd v. Peter Magesa & 5 Others**, Revision No. 343 of 2015 LCCD (2016) No. 77 and the case of **Tanzania Zambia Railway Authority and Attorney General v. Peter Reuben Masenga**, Revision No. 47 of 2022, High Court Labour Division at Dar es salaam (unreported), cited by Mr. Temba where it was held that:

> This has been proved by the CMA records which shows that the matter has been pending at mediation stage waiting for this application to be determined. I am therefore bound to hold,

that an order condoning a late application is interlocutory and so not appealable or in this case not subject of revision.

The above stance is also the position in the cases of **Bank of Tanzania v. Elisa Issangya,** Revision No. 17 of 2011, High Court Labour Division, Dar es salaam (unreported), **Equity Bank (T) Ltd v. Abuhussein J. Mvungi,** Labour Revision No. 62 of 2019, High Court Labour Division at Mwanza (unreported).

Now the issue to be addressed is; *whether the CMA's decision in grant of application for condonation is interlocutory.* The Applicant strongly believes that the Respondent had no sufficient reason(s) to be granted the extension of time sought. On the other hand, the Respondent is of the firm view that this application is not proper. That, the Applicant filed revision against an interlocutory decision.

Mr. Temba argued that the CMA's decision on the grant of condonation is interlocutory because the CMA did not determine the right of the parties. He added that the dispute was not heard on merit. The Respondent only filed application for condonation as a procedure to follow for referring late disputes. He further argued that the condonation is accompanied with the main application. Thus, the condonation decision is interlocutory.

On his part, the Applicant maintains that this application is not interlocutory. Mr. Irungu argued that the right of the parties was determined in an application for condonation. Thus, the matter was determined to its finality.

He further argued that the CMA determined the right of parties when it allowed the reliefs sought in the application for condonation and the matter was finalized. As such, any aggrieved party has right to file revision.

Mr. Irungu went on to argue that a mere filing of CMA F1 does not cloth CMA with jurisdiction to determine late filed application. He added that CMA has jurisdiction to determine the claims in the CMA F1 after the application for condonation has been determined and not otherwise. In support of the argument, he cited the case of **CRDB Bank Plc v. Lusekelo Mwakapala,** Civil Appeal No. 143 of 2021.

In determining the issue at hand, the Court will consider the meaning of interlocutory order as defined by the parties through various authorities. According to **Black's Law Dictionary**, 10th Ed at page 933 as cited by Mr. Temba the term is defined as:

> Interim or temporary; not constituting a final resolution of the whole controversy.

Again, the **Halsbury's Law of England** (4th Ed) Vol. 26 para 506 defined the term interlocutory as:

> An order which does not deal with the final right of the parties, but either (1) is made before judgement, and gives no final decision on the matters in dispute, but is merely on a matter of procedure: or (2) is made after judgement, ad merely directs how the declarations of right already given in final judgement are to be worked out, is termed interlocutory.

Again, in the case of **University of Dar es salaam v. Silvester Crispian and 210 Others** (1998) TLR 175:

> These applications only are considered interlocutory which (do) not decide the right of parties, but are made of the purpose of keeping things in status quo till the right can be decided ...

Furthermore, the Court of Appeal in the case of **Commissioner General Tanzania Revenue Authority v. Milambo Limited,** Civil Appeal No. 62 of 2022 set the following test for a matter to be considered as interlocutory or not. It was stated as follows:

> In the premises, the "nature of order tests squarely applicable in this matter and as such, we are satisfied that, following the grant of the application for enlargement of time to apply leave to seek prerogative orders, the remedy sought by the Respondent was finally and conclusively

determined. In this regard, the cases cited to us by the Respondent's counsel are not relevant in the present matter considering that, in all those cases, the appeals were dismissed because the orders did not finally and conclusively determine the matters. Therefore, in the matter under scrutiny, since the Respondent was granted reliefs sought on enlargement of time to apply leave to seek prerogative writs, the matter was wound up and as such, the respective ruling is not an interlocutory order at any stretch of imagination.

From the above quoted definitions, interlocutory order can be referred as; *a temporary order issued during proceedings which does not dispose of the case.* In determining the issue at hand; firstly, it should be noted that at the CMA, the application for condonation is not a separate filed application from the main complaint. The law directs an application for condonation to be filed together with the main complaint. This is in terms of *Rule 11(2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007* (herein GN. No. 64 of 2007) which provides as follows:

A party shall apply for condonation, by completing and delivering the prescribed condonation form when delivering the late document or application to the Commission.

The wording of the above provision is clear, an application for condonation at the CMA is accompanied by the main complaint whereby the complainant is required to fill two forms. CMA F2 which is for condonation and the referral form (CMA F1). Therefore, once an application for condonation is granted automatically the CMA will proceed to determine the main complaint brought before it. Thus, a party will not be required to restart afresh the process of filing his main complaint. This procedure is quite different from other civil cases. In normal civil cases, a party is required to seek for extension of time before filing his main application. If the main application is referred without seeking for extension of time such application will be dismissed and an aggrieved party will lose his/her right in total.

On the basis of the above noted peculiar circumstance in labour laws and many other reasons which will be apparent hereunder, it is my view that the decision for grant of condonation at the CMA is interlocutory order which can not be challenged by way of revision until the main complaint has been determined by the CMA.

Secondly, the labour laws are designed in a way to observe quick dispensation of justice and avoid the legal formalities which will basically

prolong the proceedings. This is reflected under *Section 88(4)* which states that:

> The Arbitrator-
>
> (a) May conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly;
>
> (b) Shall deal with the substantial merits of the dispute with the minimum of legal formalities

The principle is also reflected in the case of **The Supreme Court of India also in Bhagwan Swaroop v. Mool Chand** (1983) (2) SCC 132, cited with approval in the case of **Zella Adam Abrahaman (supra)** where it was lucidly stated thus:

> Fair play in action must inhere in judicial approach also as in administrative law and Court's approach should be oriented with this view whether substantial justice is done between the parties, or technical rules of procedure are given precedence over doing substantial justice in Court. A Rule o f procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties.

The same point was further observed in the case of **Pablo D. Acaylas, Jr. v. Danico G. Harayo**, [G.R. No. 1766995, July 30, 2008]:

> Technicality, when it deserts its proper office as an aid to justice and becomes its great hindrance and chief enemy, deserves scant consideration from Courts.

It was also emphasized in the case of **Zella Adam Abrahaman** (supra) where it was held that:

> We take it to be firmly established that where a rigid application of the rules will result in a manifest failure of justice, technicalities should be disregarded in order to resolve the case.
>
> The aim of the Courts should always be oriented towards rendering substantial justice as procedure has always been a hand-maid of justice.

Thirdly, in most cases, complaints concerning about lawfulness of employee's termination are instituted by the terminated employee. After termination it is presumed that such employee does not have any generated income as he/she is terminated from employment and does not receive his/her salary anymore. In such circumstance, if the procedures to obtain his right against the unfair termination is prolonged by allowing an aggrieved party of a grant of condonation to file revision before the High Court, justice will be delayed to such employee unnecessarily. Thus, defeating the principle justice delayed is justice denied as stated in the case of **Zella Adam Abrahaman** *(supra)*.

Fourthly, to harmonise the principle of the right to be heard conferred under *Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977*. By condoning the complainant, it affords the parties right to be heard on the main application for determination of their right as the matter will be determined to its finality. The principle of observing right to be heard in condonation has been expounded in the case of **Tatu Ally Muna & 2 Others v. Chama cha Walimu Tanzania**, Revision Application No. 13 of 2020, High Court Labour Division at Dodoma (unreported) where it was held that:

> There is a constitutional right to be heard so provided for in *Article 13(2) (6) (a) of the Constitution of the United Republic of Tanzania, 1977 [2005 Edition] (The Constitution)*. In order to give effect the right to be heard and other relevant legal remedies, the procedural laws, including labour procedural laws, provide for time line and condonation of time to be heard so that a person should be heard accordingly before being condemned. That was the essence of *Rules 10,11,8c 29 (1) (4) (d) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 (GN No. 64 of 2007). The Employment and Labour Relations Act, [Cap 366 RE 2019] in its section 3(f)* gives effect to the provisions of the constitution of the United Republic of Tanzania in the matters of employment and Labour relations.

Fifthly, it should be remembered that one of the objectives of labour laws is to reduce costs in handling labour matters as it is stipulated under *Rule 34 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 as well as Rule 51 of the LCR*. Therefore, allowing parties to challenge the grant of condonation will jeopardize the whole notion of saving costs to employees as well as the principle of timely justice.

Furthermore, if parties will be allowed to challenge the grant of condonation, it will affect the principle of ensuring that litigations come to an end. Thus, directly affecting the communities and national at large as parties will spend a lot of time in prosecuting cases hence contradicting the objective of the labour laws as stipulated under *Section 3 of the ELRA*.

Basing on the above legal argument, I am of the view that for timely administration of justice, many labour disputes should be resolved in horizontal level. That means, resolving many disputes at trial Tribunal (CMA) by determining the rights of the parties unlike, the vertical way which coincide with technicalities which attract parties to misuse the right of revision while the same does not determine the matter to its finality.

I am not in disregard with the case of **MIC Tanzania Limited** *(supra)*, however, the same is distinguishable to the circumstance at hand. In the referred case, the CMA dismissed the application for non-appearance of the Respondent. Aggrieved, the Respondent filed an application for setting aside the dismissal order whereby such application was also dismissed for want of sufficient reason to justify the non-appearance. Once again aggrieved, the Respondent referred the matter at High Court whereas the CMA's decision was revised and the matter was ordered to be restored at the CMA. Being dissatisfied by such order, the Applicant filed an appeal at the Court of Appeal.

The above narrated circumstances are quite different from the present case where the matter involves the grant of condonation at the CMA. As stated by the Court of Appeal in the referred case, *Rule 50 of the LCR* applies to disputes at the labour Court. Since the revision application is instituted at the High Court, it is my view that the matter is interlocutory before the High Court and the provision in question applies.

Therefore, on the basis of the above-mentioned reasons and for the interest of justice, it is my view that revision application against grant of condonation at the CMA is interlocutory. The Respondent in

such application has to wait until final determination of the case to challenge the same.

In the result, I find the preliminary objection has merit. The application at hand is found interlocutory. The matter is ordered to be remitted back to the CMA to proceed with mediation stage of the substantive dispute.

It is so ordered.

Y.J. MLYAMBINA

JUDGE

09/11/2023

Ruling delivered and dated 9th November, 2023 in the presence of, learned Counsel David Chillo for the Applicant and Paschal Temba, Personal Representative of the Respondent.

Y. J. MLYAMBINA

JUDGE

09/11/2023