IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 248 OF 2023

BETWEEN

FLORA OSCAR KAWAGE ..... APPLICANT

VERSUS

HUAYUAN SECURITY GUARD ..... RESPONDENT

RULING

Date of last Order: *15/11/2023*
Date of Ruling: *05/12/2023*

MLYAMBINA, J

In the instant matter, the Applicant challenges the decision of the Commission for Mediation and Arbitration (herein referred as CMA) which denied him an application for condonation. He filed the present application on the following grounds:

i. That, the Mediator erred in law and fact for determining application on condonation while he has no such powers.

ii. That, the Mediator erred in law and fact for refusing the admission of the Applicants' exhibit on ground that were not forming part of the records while the same formed part of the record and were served to the Respondent.

iii. That, the Mediator erred in law and facts for holding that there were no substantive reasons.

The application proceeded orally. Both parties were represented. Mr. Edward Simkoko, Personal Representative appeared for the Applicant. Whereas, Mr. Ramadhani Charles Ramadhani, learned Counsel was for the Respondent.

Arguing in support of the first ground, Mr. Simkoko submitted that; the Mediator erred in law and fact for determining application on condonation while he has no such powers. In support of his submission, he referred the Court to the decision in the case of **Barclays Bank (T) Ltd v. Ayyam Matessa**, Civil Appeal No. 481 of 2020 Court of Appeal of Tanzania at Dar es Salaam, p. 16. He argued that since the Mediator had no such powers, the decision thereof was nullity. He further argued that *Section 87(4) of Employment and Labour Relations Act [Chapter 366 Revised Edition 2019] (herein Cap 366 RE 2019)* does not confer powers to the Mediator to entertain condonation.

In response to the first ground, Mr. Ramadhan argued that *Section 87(4) of Cap 366 RE 2019* deals with jurisdiction of CMA in issuing decision only. He stated that the Personal Representative misdirected himself in arguing that the Mediator lacks powers to entertain application for condonation.

I have dully considered the submissions of the parties. On the contention as to whether the Mediator has the power to determine

application for condonation or not, I acknowledge that there are two conflicting decisions. The first school is of the view that a Mediator has no powers to determine an application for condonation. This was held in the case of **Ndovu Resources Limited v. Thierry Murcia,** Revision Application No. 371 of 2022.

The second school maintains that the Mediator has power to determine an application for condonation. This is the Court's position in the case of **Rui Wang v. Eminence Consulting (T) Ltd**, Revision No. 306 of 2022, High Court Labour Division, Dar es Salaam. In the referred case the Court was of the view that as per *Rule 12 of the Labour Institutions (Mediation and Arbitration) Rules, 2007, GN. No. 64 of 2007* (to be referred as *GN. No. 64/2007*) an application for condonation is filed together with the referral document. As a matter of procedure, a dispute at the CMA starts with mediation process then arbitration will proceed thereafter.

It was further observed that as per *Rule 15 of GN. No. 64 of 2007* the Mediator is empowered to determine jurisdictional issues relating to the dispute. Therefore, application for condonation being one among the jurisdictional issues, then the Mediator has powers to determine the same.

In the present case also, it is my view that so long as the issue relating to Mediator's power to determine an application for condonation is yet to be determined by the Court of appeal, I reiterate my decision in the case of **Rui Wang** (supra) until the Court of Appeal directs otherwise. Therefore, for the reasons stated above, the Mediator has power to determine an application for condonation. Thus, the Mediator's power under *Section 87(4) (supra)* is misapplied in the present case. In the event, the first ground lacks merit.

The second and third grounds will be jointly determined by the Court. Regarding the second ground, it was submitted that at the hearing before CMA, the Applicant stated one of reasons for delay was suspended from duty from 29/10/2021 to date and there was on going disciplinary Meeting. Such documents were in record, but the Mediator refused. At page 7 of the impugned decision, the Mediator alleged that the documents were not forming part of the record. Such act amounted to judging by relying on the fault of CMA and not the Applicant's fault. He added that the Mediator Misdirected himself by stating that they did not tender exhibits while the record spoke voluminous that they tendered documents.

In response, Mr. Ramadhani agreed that they were served with Clinic Card, letter dated 3/4/2023 to attend disciplinary meeting and

report dated 3/4/2023 for absence at work from 29/10/2021. But such documents were not forming part of the CMA records. Therefore, the Mediator was right to refuse admission of such documents.

Turning to the last ground the Applicant submitted that the Mediator erred in law and facts for holding that there were no substantive reasons. Mr. Simkoko submitted that the Applicant was suspended, there were ongoing disciplinary meetings and the Applicant's pregnancy complication were sufficient grounds. That, they produced documentations such as clinic card and other Hospital documents, but the Mediator refused to admit those documents. He added that disciplinary meetings are still going on. He therefore prayed this matter be remitted to the CMA to proceed on merits before another competent personnel.

Responding to the last ground, Mr. Ramadani submitted that the nature of dispute was claim of salaries from September, 2021. The Applicant in CMA F.2 showed that she was late for 604 days which is equivalent to one year and eight months. The Applicant cheated CMA that the dispute arose on 28/4/2023 while the dispute arose since September 2021. Therefore, as per *Rule 10(1) & (2) of GN. No. 64 of 2007,* the dispute on termination ought to be filed within 30 days and other disputes apart from termination must be filed within 60 days. He

stated that the Applicant ought to have filed her dispute within 60 days as per *Rule 10(2) (supra)*. The Applicant had to account for each day of delay. The Applicant failed to account for the 604 days. He therefore prayed for this application to be dismissed for failure to account for each day of delay.

Rejoining, Mr. Simkoko maintained that the documents were filed. It was not the fault of the Applicant. That, salary was not paid since September, 2021 which is when the dispute arose. He added that they accounted for each day of delay. There was suspension from work, following the issue before the Labour Commissioner and pregnancy complications.

I have keenly gone through the records, as rightly submitted by Mr. Ramadhani, the alleged documents do not form part of the CMA records. Even during their submission, the Applicant through the representative of Mr. Simkoko did not refer to the alleged documents. Therefore, the same could not be relied by the Arbitrator because they are not part of the record. It should be noted that the one who alleges must prove. This principle is provided under *Section 110 of the Evidence Act* [Cap 6 Revised Edition 2019]. The principle is highlighted in numerous Court decisions including the case of **Barelia Karangirangi**

v. Asteria Nyalwamba, Civil Appeal No. 237 of 2017, Court of Appeal of Tanzania (unreported) where the Court held *inter alia* that:

> At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must Prove.

The reason for the delay to file the intended application as stated by the Applicant in the CMA F2 is adjournment of the disciplinary hearing. She further stated that the delay was for 604 days. After examining the records, there is no proof of the alleged reason. As stated above, there is no any document was tendered to prove the said assertion. Therefore, the Applicant failed to prove his allegation before the CMA. The delay of 604 days is inordinate and had to be accounted for.

Based on the nature of the matter at hand, it is my view that the Applicant herself failed to prove her case and decided to place her blame on the Arbitrator. The behavior which was strongly discouraged by the Court in the case of **Danford Evans Omari v. Tazama Pipeline Limited,** Revision No. 684 of 2019 High Court Labour Division at Dar es Salaam where my Sister Muruke, J (as she then was) held that:

It is my conviction that parties to labour dispute should not turn Mediator/arbitrator as punching bag, simply because their decision was not in their favour.

I subscribe to the above finding. Since the Applicant herself failed to prove her case, the Mediator properly refused an application for condonation. In the result, I find all grounds of revision have no merit as stated above. The Applicant had no sufficient reason for the grant of application for condonation. Thus, the CMA's decision is hereby upheld. The application is dismissed accordingly.

It is so ordered.

Y. J. MLYAMBINA

JUDGE

05/12/2023

Ruling delivered and dated 5th December, 2023 in the presence of the Applicant and her Personal Representative Mr. Edward Simkoko and in the absence of the Respondent.

Y.J. MLYAMBINA

JUDGE

05/12/2023