**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 138 OF 2024**

*(Arising from Award issued on 28/7/2023 by Hon. Kokusiima, L, Arbitrator, in Labour Dispute No. CMA/DSM/KIN /559/2022/81/2023 at Kinondoni)*

**THE REGISTERED TRUSTEES OF TANZANIA**

**ISLAMIC CENTRE ..... APPLICANT**

**VERSUS**

**RAMADHAN SEIF ..... RESPONDENT**

# JUDGMENT

*Date of Last Order: 28/02/2024*
*Date of Judgement: 05/04/2024*

**B. E. K. Mganga, J.**

Facts of this application are that, on 4th October 2022, Ramadhan Seif, the herein respondent, filed referral Form (CMA F1) before the Commission for Mediation and Arbitration (CMA) complaining that Tanzania Islamic Centre breached his contract of employment. In the said CMA F1, respondent indicated that the said Tanzania Islamic Centre failed to pay his July 2022 and August 2022 salaries. He further indicated that the said Tanzania Islamic Centre did not give him duties to perform hence he was constructively terminated. Respondent also

indicated that the dispute arose on 17th August 2022. In addition to the foregoing, respondent indicated in the said CMA F1 that, condonation was not required. Based on those allegations, respondent indicated in the said CMA F1 that he was claiming to be paid TZS 18,000,000/=. On the same date, namely, 4th October 2022, respondent filed the notice of application supported by his affidavit stating that he initially filed Labour dispute No. CMA/DSM/KIN/479/2022 but the same was struck out by Mbunda , PJ, Mediator because CMA F1 was defective and was granted 14 days to file the proper CMA F1.

On 19th October 2022 the parties appeared before Hon. Abdallah, M, Mediator, as a result, Nembwani Ngitile, advocate of the Tanzania Islamic Centre, prayed to be granted leave to file the counter affidavit. The Mediator granted leave to the Tanzania Islamic Centre to file the counter affidavit by 26th October 2022 as respondent did not object. On 25th October 2022, Abeid Kasabalala, affirmed and filed a counter affidavit on behalf of the Tanzania Islamic Centre stating *inter-alia* that, respondent did not give reasons for condonation to be granted and that, respondent failed to account for each day of the delay. On 11th November 2022, respondent filed the reply to the counter affidavit stating *inter-alia* that, Tanzania Islamic Centre did not file the counter

affidavit within fourteen days. On the same date namely, 11th November 2022, respondent filed application for Condonation of later referral form (CMA F2) without an affidavit. On 13th February 2023, the arbitrator issued an order for the application for condonation to be heard exparte because Tanzania Islamic Centre failed to enter appearance on that date. The arbitrator adjourned the application for condonation to be heard on 6th March 2023. On the later date, Mr. Abeid Kasambalala on behalf of Tanzania Islamic Centre, entered appearance but he was not afforded right to be heard because, the arbitrator informed him that there is an order for the application for condonation to be heard exparte. On the said date, namely, 6th March 2023, Hon. Abdallah, M, Arbitrator, heard application for condonation filed by the respondent. On 17th March 2023, Hon. Abdallah, M, Arbitrator, granted the application for condonation.

On 19th April 2023, the parties signed the Certificate of non-settlement (CMA F6) before Hon. D. Ngaruka, Mediator, showing that the dispute that was mediated is termination of employment. The complaint was thereafter referred to Hon. Kokusiima, L, Arbitrator, for arbitration where amongst the issues were whether there was employment relationship between the parties and whether termination was fair. On

24th November 2023, Hon. Kokusiima, L, Arbitrator, having heard evidence of the parties, issued an award that there was employment relationship between the respondent and Tanzania Islamic Centre and that termination was unfair both substantively and procedurally. Based on those findings, the arbitrator awarded respondent to be paid TZS 14,000,000/= being 28 months salaries.

Applicant was aggrieved with the said award hence this application for revision. In support of the Notice of Application, applicant filed the affidavit affirmed by Khamis Salum Khamis one of the Board members of the applicant. In the said affidavit, applicant raised four(4) issues namely:-

1. *Whether the dispute was instituted against a proper part.*
2. *Whether the respondent was employed by the applicant.*
3. *If issue No. 2 is answered in the affirmative whether the respondent is bound by exhibit T-2 deed of settlement tendered in court.*
4. *Whether the honourable trial arbitrator was right to declare that the respondent was terminated unlawfully and award payment of 14,000,000/= as salary in arrears for a period of 28 months without being employed by the registered trustees of Tanzania Islamic Center.*

In resisting the application, respondent filed both the Notice of Opposition and his counter affidavit.

When the application was called on for hearing, Ms. Benardeta Fabian, learned advocate, appeared and argued for and on behalf of the applicant while Mr. Danford Leonard, personal representative appeared and argued for and on behalf of the respondent.

Arguing the 1st issue, learned counsel for the applicant submitted that, applicant is a board of trustee Registered under the Trustees Incorporation Act [Cap. 318 R.E 2019]. She further submitted that, in terms of Section 6(2) of Cap. 318 R.E 2019(supra), respondent was supposed to file the dispute against the Registered Trustees of Tanzania Islamic Centre and not Tanzania Islamic Centre that does not exist. She went on that, in terms of section 8 of Cap 318 R.E 2019(supra), it is the Board of Trustees that can be sued and not Tanzania Islamic Centre hence in the application at hand, respondent cannot even enforce the CMA award. To support her submissions, learned counsel for the applicant cited the case of ***The Board of Trustees of National Social Security Fund v. Kampala University Limited,*** Civil case No. 19 of 2021, HC(Unreported). She therefore prayed CMA proceedings be nullified and the award be quashed and set aside.

Arguing the 2nd and 3rd issues, submitted that, respondent tendered contract of employment (exhibit R1) that was signed on 10th

January 2021 which shows that respondent was employed by Ally K. Milanzi on behalf of the applicant. She further submitted that, the Deed of settlement(exhibit T2) dated 9th February 2020 that was tendered by the applicant, shows in clause 9 that, the parties will not be responsible in relation to labour dispute. She added that, at the time of signing exhibit R1, Ally K. Milanzi had no power in terms of the said deed of settlement(exhibit T2), to sign employment contract with the respondent. She strongly submitted that, respondent was never employed by the applicant and that, Ally K. Milanzi had no power to employ respondent. She added that, the respondent was bound by the said deed of settlement.

Submitting on the 4th issue, learned counsel for the applicant argued that, respondent was never employed by the applicant hence there was no termination. She added that, the amount of TZS 14,000,000/= awarded to the respondent is not justified. With those submissions, learned counsel for the applicant prayed the application be allowed.

Responding to the 1st issue, the personal representative of the respondent submitted that, respondent was employed by the applicant. He argued that, it was not a duty of the respondent to find whether

applicant has power to be sued or not. He was quick to submit that, while at CMA, respondent prayed to amend the name of the employer namely, the herein applicant and that the said prayer was made through a letter but when applicant's representative was asked, he submitted orally that the matter should proceed as it was. In his submissions, Mr. Leonard, the personal representative of the respondent conceded that, procedures to amend the name of the applicant was not properly adhered. He therefore prayed the court to issue an order amending the name of the applicant.

Submitting on the 2nd and 3rd issues, the personal representative of the respondent argued that, respondent was employed by the applicant as per employment contract dated 10th January 2021 (exhibit R1) that was signed by Ally K. Milanzi the chairperson of the board of Trustees of Tanzania Islamic Centre. He further submitted that, respondent was not part to the deed of settlement (exhibit T2) hence the said deed of settlement does not bind him. Mr. Leonard conceded that, Respondent was employed one year after exhibit T 2 was signed. He was quick to submit that, the Board of Trustees did not change as shown in the drawn order of the deed of settlement (exhibit T2). He strongly submitted that, respondent was not bound by exhibit T2.

On the relief awarded to the respondent, personal representative of the respondent submitted that, the award of TZS 14,000,000/= was justifiable. He added that, respondent was entitled to be awarded 36 months salaries of the remaining period of the contract.

In rejoinder, Ms. Fabian, learned counsel for the applicant submitted that, the prayer to amend the name of the employer by a letter written by the respondent was not sufficient. She argued that, respondent was supposed to pray to amend CMA F1. She maintained that, the deed of settlement did not give power to Ally K. Milanzi to employ the respondent.

At the time of composing the judgment after the CMA record was forwarded to the court, I examined it and noted that, in the application for condonation(CMA F2), respondent did not state reasons for the delay or degree of delay. I therefore resummoned the parties and asked them to address whether, condonation was properly granted or not.

Responding to the issue raised by the court, Ms. Fabian, learned counsel for the applicant, submitted that, the application for condonation was not properly filed because, it violated the provisions of Rule 11(2) and (3) of the Labour Institutions (mediation and Arbitration) Rules, GN. No. 64 of 2007 that requires an applicant to show degree of lateness

and reasons for the delay. She cited the case of ***Sebastian Deogratias Kajula v. Simon Group/ Shamba Africa***, Civil Appeal No. 160 of 2021, CAT(unreported) on the position that condonation can only be granted if reasons are advanced. She added that, the application for condonation was defective. With those submissions, learned counsel for the applicant prayed the court to quash the order granting condonation to the respondent and nullify CMA proceedings.

On his part, Mr. Leonard, the personal representative of the respondent submitted that, application for condonation was properly filed. He submitted that, an application for condonation was filed on 4th October 2022 when respondent filed an affidavit and that CMA F2 was filed on 17th November 2022. When probed by the court if that is the procedure of filing an application for condonation, the personal representative of the respondent, conceded that Rule 11(2) of GN. No. 64 of 2007 (supra) requires CMA F2 be filed at the time of filing application for condonation. He further conceded that, Rule 11(3) of GN. No. 64 of 2007(supra), requires applicant to state reasons for the delay and degree of lateness. He also conceded that, in CMA F2 that was filed on 17th November 2022, respondent did not indicate reasons for the

delay and degree of lateness. With those submissions, he maintained that, the application for condonation was properly filed and granted.

In disposing this application, I will start with the legal issue relating to application for condonation raised *suo motu* by the court. It is undisputed by the parties that, on 4th October 2022 respondent filed only the referral Form (CMA F1) and the affidavit without filing the application for condonation (CMA F2). It is also undisputed by the parties that, respondent filed CMA F2 after applicant has filed the counter affidavit stating that respondent did neither disclose reason for the delay, degree of lateness nor account for each day of the delay. It is my considered view that, the application for condonation was not properly filed at CMA. I am of that view because, the provisions of Rule 11(1), (2), (3)(a),(b),(c), (4),(5) and 29(1)(a),(3), (4) (b),(c) and (d) of GN. No. 64 of 2007 were not complied with. Rule 11 of GN. No. 64 of 2007 (supra) provides:-

> "*11.-(1) This rule applies to any dispute referral document or application delivered outside the applicable time prescribed in the Act or these Rules.*
>
> *(2) A party shall apply for condonation, by completing and delivering the prescribed condonation form when delivering the late document or application for condonation to the Commission. This form must be served on all parties to the dispute.*

*(3) an application for condonation shall set out the grounds for seeking condonation and shall include the referring party's submissions on the following-*

*(a) the degree of lateness;*

*(b) the reasons for the lateness;*

*(c) its prospects of succeeding with the dispute and obtaining the relief sought against the other party;*

*(d) any prejudice to the other party; and*

*( e) any other relevant facts.*

*(4) The application condonation (sic) shall be processed in accordance with Rule 29 of these Rules.*

*(5) Where the Commission's prescribed form is correctly completed, served on all parties to the dispute and delivered to the Commission, the application shall be deemed to have been properly lodged in terms of rule 29 of these Rules.*

*(6) the Commission may assist a referring party to comply with this rule."*

It is clear from the quoted rule that, in application for condonation, applicant must set out grounds for condonation, give reasons for the delay and the degree of lateness. My conclusion is fortified by what was held by the Court of Appeal in the case of ***Sebastian Deogratius Kajula vs Simon Group/Shamba Africa*** (Civil Appeal No. 160 of 2021) [2024] TZCA 83 (22 February 2024) and ***Rombo District Council & Another vs Hamis Haji Mfinanga*** (Civil Appeal No. 246 of 2022) [2024] TZCA 212 (21 March 2024). In ***Mfinanga's case*** (supra) the Court of Appeal held that:

*"It is trite law that, a party seeking condonation is required to give a reasonable and acceptable explanation for the delay."*

The Court of Appeal further quoted its decision in ***Kajula's case*** (supra) that:-

> *"...a party seeking condonation is saddled with a duty to make out a case entitling it to the court's indulgence. For, otherwise, it must be trite that condonation cannot be given on a silver plate... We also wish, to record our views that, given the position obtained under our labour laws, rather than wasting time as he did, the appellant could have timely referred his grievances to the CMA and thereafter pursued a court annexed mediation in the pre-arbitration stage of his case in terms of section 14 (1 )(a) of the Labour Institutions Act."*

As pointed out hereinabove, in the application for condonation, respondent did not give any reason justifying the grant of condonation. In fact, there is nothing on record justifying the grant of condonation. It is my view that, the arbitrator erred in law in granting condonation while there was no justification. I am alive that grant or refusal to grant condonation is a discretion of the arbitrator. But, that discretion, must always be used judiciously based on what is fair, under the circumstances and guided by the principles of law. See the case of ***Mza RTC Trading Company Limited vs Export Trading Company Limited***, Civil Application No.12 of 2015 [2016] TZCA 12. It has been held several times by this court and the Court of Appeal that, in order

the court to exercise its discretion, applicant(s) must provide sufficient reason for the delay or provide relevant materials and circumstances justifying the grant of the application. See the case of ***Victoria Real Estate Development Ltd vs Tanzania Investment Bank & Others*** (Civil Application 225 of 2014) [2015] TZCA 354, ***Rose Irene Mbwete vs Phoebe Martin Kyomo*** (Civil Application 70 of 2019) [2023] TZCA 111, and ***Omary Shaban Nyambu vs Dodoma Water & Sewarage Authority*** (Civil Application 146 of 2016) [2016] TZCA 892 to mention but a few. In the application at hand, as pointed out herein above, there was no material disclosed by the respondent warranting the arbitratot to exercised her discretion in granting condonation. In other words, condonation was granted arbitrarily.

It is also clear from rule 11 of GN. No. 64 of 2007 quoted hereinabove that, applicant must complete the prescribed form which, in fact, is CMA F2 and serve the other party. In addition to that, in terms of Rule 29(4) respondent was supposed to file an affidavit stating *inter-alia* grounds for condonation. In the application at hand, respondent filed the referral form(CMA F1) on 4th October 2022 together with an affidavit without completing the prescribed form (CMA F2) but, he only filed the affidavit that was supposed to support CMA F2. I have examined the

said affidavit and find that, it has nothing to do with condonation because, respondent did not state grounds for condonation, reason for the delay or state that he was applying for condonation. In my view, that was a clear violation of the afore quoted Rule. As pointed hereinabove, on 25th October 2022, Abeid Kasabalala filed the counter affidavit stating *inter-alia* that, respondent did not state reason for the delay and further that, he did not account for each day of the delay. In my view, that was an alarm to the arbitrator to scrutinize competence of the application but that was not done.

I have examined the CMA record and find that, on 16th November 2022 when the application was called for hearing, all parties were present and the arbitrator *suo motu* recorded:-

> ***Tume**: pande zote mbili wapo na wako tayari kuendelea na kusikiliza maombi, ila Tume imegundua kuwa maombi yameletwa kwa mapungufu hakuna CMA F2. Kwa kuwa Tume imepewa mamlaka ya kuendesha shauri kwa namna ambayo inafaa na kutosumbuliwa sana na technicalities, ukizingatia mlalamikaji yuko in person na ni lay person, Tume … inamuagiza mleta maombi kukamilisha maombi yake kwa kuleta CMA F2 ndani ya siku 7."*

It is clear from the quoted paragraph that the arbitrator noted that the application for condonation was incompetent because initially respondent did not file CMA F2. With that in mind, the arbitrator granted leave *suo motu* to the respondent to file CMA F2. It can be recalled that,

that was done after the herein applicant has filed the counter affidavit challenging competence of the application for condonation. Therefore, the said *suo motu* leave was granted to preempt what was stated by the herein applicant in her affidavit. This was an error on part of the arbitrator because she was supposed to hear the parties based on what was already pleaded by the parties. More so, the *suo motu* leave was granted denying the applicant right to be heard.

The record is clear that based on the *suo motu* leave granted to the respondent by the arbitrator, on 17th November 2022, respondent filed the application for condonation(CMA F2) and the reply to the counter affidavit. Despite of being granted *suo motu* leave, in the said CMA F2, respondent did not indicate reasons for the delay or degree of lateness. More so, he did not state the date the dispute arose. Again, in the reply-affidavit to the counter affidavit, respondent said nothing in relation to reasons for the delay or grounds for seeking condonation. Again, despite of being directed by the arbitrator to file CMA F2, respondent did not comply with the provisions of Rule 11(3) and 29(4)(d) of GN. No. 64 of 2007 (supra). Yet, in her ruling, the arbitrator granted condonation to the respondent and pave way for the complaint to be mediated and finally arbitrated. It is my view as pointed

hereinabove that, there was no justification for the arbitrator to invoke the provisions of Rule 31 of GN. No. 64 of 2007 in granting condonation to the respondent.

For the foregoing, I find that condonation was improperly granted to the respondent without a proper application. I therefore find that all that proceeded thereafter is a nullity. In short, I find that CMA proceedings are a nullity and the award arising therefrom cannot stand.

I am of the afore conclusion because, CMA was not properly clothed with jurisdiction. I am of that considered opinion because CMA F1 was filed on 4th October 2022 respondent indicating that he was claiming unpaid salary for August and July 2022 and that there was constructive termination. In the said CMA F1, respondent indicated that the dispute arose on 17th August 2022 but in his evidence, respondent(PW1) stated that the dispute arose on 10th June 2022. In terms of Rule 10(2) of GN. No. 64 of 2007, the claim for unpaid salary for August 2022 and July 2022 were supposed to be filed within 60 days and that of constructive termination was supposed to be filed within 30 days as per Rule 10(1) of GN. No. 64 of 2007(supra) but all these claims were filed outside the prescribed period without proper application for condonation.

What I have held hereinabove has disposed the whole applicant. I therefore find it unnecessary to deal with the issues raised by the applicant.

Dated in Dar es Salaam on this 5th April 2024.

B. E. K. Mganga
**JUDGE**

Judgment delivered on this 5th April 2024 in chambers in the presence of Antonia Agapit, Advocate for the Applicant and Ramadhan Seif , the Respondent.


B. E. K. Mganga
**JUDGE**