

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION APPLICATION NO. 70 OF 2022

(Arising from the Ruling delivered on 17/2/ 2022 by Hon. P.P Mahindi, Mediator, in Labour complaint No. CMA/DSM/ILA/219/2021 at Ilala)

BETWEEN

BENJAMINI WATSON MWAIJIBE APPLICANT

AND

ELLEN AND ETHAN CONSULT RESPONDENT

EX PARTE JUDGMENT

*Date of last Order: 28/06/2022
Date of Judgment: 15/7/2022*

B. E. K. Mganga, J.

It is said that on 3rd January 2020, respondent employed the applicant for a specific task to undertake construction works as unskilled labour at Stigler's Gorge, Selous Game Reserve Rufiji Pwani. On 1st February 2020, while on the cause of employment, applicant was involved in an accident at Matambwe area within Morogoro Region. He was attended at Morogoro Reginal Hospital and thereafter transferred to

Muhimbili Orthopaedic Institute (MOI) in Dar es Salaam. On 3rd May 2021, respondent terminated employment of the applicant due to incapacity. On 28th June 2021, applicant filed labour complaint No. CMA/DSM/ILA/219/2021 before the Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be paid 36 months' salary as compensation for unfair termination and salary arrears for the month of April 202. Being out of time, applicant filed an application for condonation (CMA F2) supported by his affidavit. In CMA F2, applicant indicated that he was late for 22 days reasons behind being sickness. In the affidavit in support of the application for condonation, in addition to the incidence of accident that caused him to be hospitalized at MOI, applicant deponed that he fell sick on 20th May 2021 hence unable to make follow up and file his claim within time. He attached a medical report from Tambukareli Dispensary located in Temeke Municipality showing that he was suffering from Malaria and Typhoid and that he was excused from duty for 14 days and medical reports from MOI.

On 17th February 2022, Hon. Mahindi P.P, Mediator, delivered a ruling dismissing the application for condonation on ground that applicant failed to account for each day of the delay and further that he had no good reason for the delay.

Applicant was aggrieved by that ruling hence this application for revision. In the affidavit in support of the application, applicant raised two issues namely: -

1. *Whether applicant had reasonable grounds to file an application for condonation.*
2. *Whether the mediator was right not to condone the application by the applicant.*

I should point from the outset that, although respondent was served through substituted service by publication in Mwananchi Newspaper and daily news, she did not file the counter affidavit to counter what was deposed by the applicant. Therefore, the application was heard *ex parte*. I have examined the CMA record and find that at CMA and noted that respondent did not file the counter affidavit to oppose the application for condonation but counsel for the respondent made final submissions from the bar challenging evidence of the applicant contained in the affidavit in support of the application. The mediator relied also on submissions made on behalf of the respondent to dismiss the application for condonation. In my view, that was not proper because reliance was made on submissions from the bar which is not evidence. The court of Appeal was confronted with a similar issue in the case of ***Rosemary Stella Chambejairo v.***

David Kitundu Jairo, Civil Reference No. 6 of 2018 wherein no counter affidavit was filed to counter what was stated in the affidavit and held: -

*"...an affidavit in reply being a substitute of oral evidence ought to be sworn if a party intends to counter any fact deponed in the affidavit in support unless the point is legal, then even without an affidavit in reply, that point can be addressed...respondent's submissions were in response to what was deponed in the affidavit sworn by Ms. Rwechungura elucidating what transpired, but without any affidavit in reply to that effect. The respondent's submission under the circumstance was akin to testimony from the bar, the practice abhorred and discouraged by the Court ... We can therefore say without any doubt that all the facts deponed were not disputed as there was nothing countered...All what has been submitted to oppose the application were statements from the bar. The position as regard to the validity of such statement has been stated by the Court in a number of its decisions including those in the cases of **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 and **Bish International B.V. & Rudolf Teurnis Van Winkelhof v. Charles Yaw Sarkodie & Bish Tanzania Limited**, Land Case No. 9 of 2006 (both unreported)".*

The Court of Appeal went on to reproduce what it held in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam** (supra), as hereunder: -

". . . submissions are not evidence. Submissions are generaiiy meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

Now, back to the application at hand. Mr. Armando Swenye, learned counsel for the applicant submitted that the reason advanced by the applicant for the delay is sickness. He submitted that applicant was terminated on 03rd May 2021 and filed the dispute on 28th June 2021 together with application for condonation. He added that applicant fell sick on 20th May 2021 as shown in BM1 and BM2. Counsel for the applicant submitted further that applicant was not negligent.

As pointed out hereinabove, respondent did not file counter affidavit but in the ruling dismissing the application for condonation, the mediator referred to submissions made by counsel for the respondent. In my view, since respondent did not file the counter affidavit, the only evidence that was available which the mediator was supposed to consider granting or dismissing an application, was that of the applicant. That said, I hold that the mediator erred to consider submissions made on behalf of the respondent as evidence in dismissing the application for condonation. I am of that firm view because submissions are not evidence.

In the affidavit in support of the application for condonation, applicant attached medical report showing that he fell sick on 20th May 2021 and was excused from duty for 14 days. Further to that, applicant deponed in his affidavit that he was involved in a motor vehicle accident

while in the course of employment, as a result, he was admitted at MOI due to serious injuries he sustained. Based on the attached documents to the affidavit in support of the application, applicant's termination was due to incapacity to perform duties after the said accident. With all fairness, I have read the annexures to the said affidavit and find that, this is one of the fit cases for the court to exercise its discretionary powers and grant condonation so that parties can be heard on merit.

That said and done, I hereby revise the CMA ruling and grant condonation to the applicant so that the dispute can be heard on merit. Parties are hereby directed to go to CMA so that the dispute can be heard on merit.

Dated at Dar es Salaam this 15th July 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 15th July 2022 in the presence of Kambibi Kamugisha, Advocate for the applicant but in the absence of the respondent.



B. E. K. Mganga
JUDGE