

THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LABOUR REVISION NO.82 OF 2019

(Originating from Labour Dispute No. CMA/GTA/90/2017)

SAMWEL JAPHAT APPLICANT

VERSUS

GEITA GOLD MINING LIMITED RESPONDENT

RULING

Last order: 12.06.2020

Ruling date 18.06.2020

A.Z.MGEYEKWA, J

This an application for revision whereas, the applicant prays for this court to call and revise the proceedings of the Commission for Mediation and Arbitration of Geita. The application was opposed by the respondent who filed a Counter Affidavit and raised a preliminary objection on four grounds that:-

- 1. This court has been improperly moved under the wrong provisions of the law.*
- 2. The application is incompetent for the Notice of Application offends Rule 24(2) of the labour court Rules GN No. 106 of 2007.*
- 3. The Notice of representation/engagement is incompetent for it offends Rule 43(1)(a) of the labour court Rules GN No. 106 of 2007.*
- 4. The Affidavit in support of the application is incurable defective;*
 - (i) For want of proper verification as required by the law.*
 - (ii) For it contains argument and speculation.*

The hearing was done by way written submission whereas, the filed respondent his submission in chief on 1st day of June, 2020 the applicant filed his reply on 8th day of June, 2020.

Arguing on the first point of objection, Ms. Grace Majwala submitted that this court has been improperly moved under a wrong provision of law. She argued that it is trite law that the court must be properly moved to hear and determine an application. She argued that the applicant has cited section 91 (b) (i) (b) while the same does not exist in the Employment and Labour Relations Act No.6 of 2004, thus the applicant has cited a wrong citation of the law and the same does not

move this court to grant what is sought by the applicant. To support his argumentation she cited several cases; **Naibu Katibu Mkuu (CCM) v Mohamed Versis Sons ZNZ**, Civil Application No. 3 of 2003 (unreported), **NBC LTD and Kalunga & Company Advocates**, Civil Application No. 225 of 2004 (unreported) and **John Paul Shibuda and Another v Nordox Industries As**, Civil Application No. 171 of 2015 Court of Appeal Tanzania at Dar es Salaam (unreported). She concluded by stating that a wrong citation of the enabling or applicable law in moving the court renders the application incompetent and liable to strike out.

Arguing on the second point of objection that the application is incompetent for the Notice of Application offends Rule 24 (2) of the Labour Court Rules GN. 106 of 2007. The learned counsel for the respondent argued that the cited Rule 24 (2) of the Rules states that the notice of application shall substantially comply with Form 4 in the Schedule to these Rules and signed by a party bringing the application. She went on to argue that the word shall make it mandatory for the applicant bringing the notice of the application to sign it and not otherwise. He went on to state that in the instant application the Advocate who signed the application is not recognized because he did

not disclose his name. He added that the same renders the notice of the application to be incompetent hence suffers miserable fate. She urged this court to strike out the application. Submitting for the 3rd point of objection, Ms. Grace argued that the Notice of representation is incompetent for it offends Rule 43 (1) (a) of the Labour Court Rules GN. 106 OF 2007. He argued that the applicant did not disclose the name of representative thus the same defects the purpose of advising the Registrar and the respondent herein as to who exactly represents the applicant. He further argued that the act of the uncertainty of the applicant representative's name in the notice of engagement has rendered the notice to become incompetent in the eyes of the law. He urged this court to strike out the application.

On the **3rd and 4th** objection, that the affidavit in support of the application is incurably defective for want of proper verification as required. She argued that the applicant's affidavit lacks proper verification since the applicant did not mention specific sub-paragraphs in paragraph 10, whether the information contained in paragraph 10 (a) (b) is known to the applicant personally or was informed by someone unknown. She added that failure to disclose the source of information makes the applicant's affidavit incurably defective. Ms.

Grace fortified her argumentation by referring this court to the case of **Anatol Peter Rwebangira v The Principal Secretary Ministry of Defence and National Service and Another**, Civil Application No. 548/04 of 2018 CAT, Bukoba (unreported).

On the last point of objection, she argued that the applicant's affidavit contains arguments and speculation while an affidavit is supposed to contain statements of facts and circumstances to which the witness deposes of own personal knowledge which he believes to be true. She referred this court to paragraph 3 and 4 of the affidavit. To support his position she cited the case of **Uganda Commissioner of Prisons, Exparte Matovu** (1966) IEA 514, and the case of **MMG Gold Ltd v Herts Tanzania Ltd**, Misc. Comm. Application No. 118/2015 BC Commercial Division, Dar es Salaam (unreported). The learned counsel for the respondent urged this court to expunge the said paragraphs.

In his brief reply, Mr. Lutehanga lamented that there is more than one provision of the law which gives a court power. He added that when one provision is properly cited it suffices to move the court. He went on to state that the applicant cited Rule 28 (1), (a),(b). (c), (d) and (e)

of the Labour Court Rules, 2007 among the other provision of law to move the court and the same gives the court power to entertain this matter.

Submitting on the 2nd and 3rd points of objection, Mr. Lutehanga argued that these points of objection are based on technicalities and the same are wasting the time of the court hence causes miscarriage of justice. To fortify his submission he cited the case of **Alliance One Tobacco Tanzania Ltd and another v Mwajuma Hamisi as the Administratrix of the Estate of Philemon R. Kilenyi and another**, Misc. Civil Application No. 803 of 2018. He went on to argue that since the Advocate signed on behalf of his client and mentioned the law firm the same suffice and the respondent is not prejudiced.

With respect to the 4th and 5th points of objection, Mr. Lutehanga argued that it is principle of law that document speaks by itself, he referred this court to the applicant's affidavit and argued that there is no any paragraph to which the applicant state that he was informed since the applicant is well conversant with his case. He argued that the alleged paragraphs 3 and 4 of the affidavit do not contain legal arguments and speculations instead they contain narrations of the event in consideration to the matter at hand.

In conclusion, the learned counsel for the applicant prays this court to dismiss the preliminary objection.

After a thorough perusal of the point of preliminary objection along with the submissions of both parties, the issue for determination is *whether the preliminary objection is meritorious.*

Addressing the second point of objection, I have gone through Rule 24 (2) of GN. 106 of 2007 it provides that:-

*" 24 (2) The notice of application **shall** substantially comply with Form No.4 in the Schedule to these Rules, **signed by the party bringing the application** and filed and shall contain the following information..." [Emphasis added].*

The words in the above Rule is couched in a mandatory term by the use of the word ought this means that the procedure set by the law has to be followed not the practice. Following the mandatory requirement under the above mentioned Rule, the applicant was bound to sign the Notice of application contrary to that the applicant contravenes Rule 24 (2) of GN.106 of 2017.

For the aforesaid reasons, I am in accord with the learned counsel for the respondent that the party who brings the application was

supposed to sign the Notice of application. In this instant application, it is the applicant who brings the application and he gives his Advocate mandate that means the Advocate is engaged to run the case but cannot sign on behalf of the applicant especially when the law specifically requires the applicant to sign the Notice of Application.

Having considered the above point of preliminary objection, as shown above, it is evident that the present application is improperly filed before this Court. Since this point alone renders the application incompetent, I find no any justifiable legal reasons to deal with other points of preliminary objection, as it will not reverse the decision made above.

In the result, and for the above reasons, I would uphold the preliminary objection. The application, accompanied by an incurably defective affidavit is declared incompetent, and accordingly, I strike it out without costs.

Order accordingly.

DATED at Mwanza this 18th day of June, 2020.


A.Z.MGEYEKWA

JUDGE

18.06.2020

Ruling delivered on 18th day of June, 2020, via audio teleconference and Ms. Grace Majwala, learned counsel for the respondent and holding brief for Mr. Lutehanga, learned counsel for the applicant was remotely present.


A.Z.MGEYEKWA
JUDGE
18.06.2020