

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

MISCELLANEOUS APPLICATION NO. 07 OF 2019

(Originated from Complaint No. CMA/MBY/18/2010)

LOYD MWAITETE APPLICANT

VERSUS

COCA COLA KWANZA LTD RESPONDENT

RULING

Date of Ruling: 17.06.2020

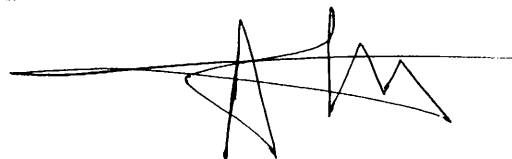
Dr.A.Mambi, J

This Ruling emanates from an application Preliminary objection raised by the respondent. Earlier the applicant filed his application for extension of time to file labour Revision out of time. During hearing the applicant appeared under the service of Benedict Shawi while the respondent was represented by Mr Mbise, the learned Counsel.

Parties agreed so argue the matter by way of written submission and this court ordered parties to do so.

The Respondent Counsel Mr Mbise in his submission submitted that

Any affidavit must be in accordance to requirements of Order XIX Rule 3 of The Civil Procedure Code, R.E. 2002. He referred the

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decision of the court in *Rebeca Daniel William Versus Dandvik Mining Construction Ltd*, Labour Revision No. 10 of 2011. Mr Mbise was of the view that an Affidavit or Affidavits must be in accordant to the dictates of Order XIX Rule 3 of The Civil Procedure Code, (Cap. 33 R.E. 2009) and Rule 24(3) of The Labour Court Rules, (G.N. 106 of 2007). He argued that defective and an invalid and it cannot support the Notice of Application and/or Chamber Summons. He averred that such affidavit offends, the serious way, mandatory Rules governing affidavits, contained in Order XIX Rule 3 of the Civil Procedure Code. He referred paragraph 6 of the purported Affidavit of Lloyd Mwaitete which reads that:-

“... I was informed by the CMA officials that the then presiding arbitrator was reallocated (sic) from Mbeya Zone to Rukwa Zone before delivering the award and that I could be notified when the award was ready for collection”.

He was of the view that under that paragraph the name or names of the so-called CMA officials ought to have been disclosed and evidence from them to that effect be obtained to confirm. He also challenged paragraph 8 of same Affidavit. He referred the decisions of the Court of Appeal of Tanzania in the ***Jestina George Mwakyoma Versus Mbeya-Rukwa Autoparts and Transport Limited*** Court of Appeal Civil Application No. MBY 7 of 2000.

Alternatively, Mr Mbise argued that the application before for enlargement of time within which to apply for Revision of an Award delivered on 02nd June, 2016 has no merit since there is no reasons for such a long delay. He argued that this application was filed on

14/06/2019 after almost three years later and the Applicant has not accounted for each day of delay. He argued that ignorance of his Advocates knowledge of legal procedures in drawing Legal documents is not a good cause for the delay. He referred the decision of the Court of Appeal in **Civil Application No. MBY 5 of 2005 between Mtokambali Masalaga Versus Edward Mogha.**

In response, the applicant through the Learned Counsel Mr B. Shawi submitted that did not seem to respond on the point of objection raised by the respondent on the legality of the applicant's affidavit rather than focusing more on justifying the reasons for the delay of his delay in filing his application for revision. The learned Counsel Submitted that It is not true that the application was brought out of the sixty days, the same could be the case, if the Applicant did nothing from the date of delivering an award to the date of filing the application for enlargement of time. He argued that under the Applicant's affidavit in support of the application for enlargement of time, the document self-speaking on what transpired leading to the present application. He quoted the content of the affidavit as follows:

5. *That having completed at hearing stage, the award was not issued within 30 days by the Honourable Arbitrator.*
6. *That upon visiting at the CMA offices for the award on the scheduled date, that is on 09th May, 2016 I was informed by the CMA officials that the then presiding Arbitrator was reallocated from Mbeya zone to Rukwa zone before delivering the award and that I could be notified when the award was ready for collection.*

7. *That unfortunately I was not informed by the Commission on the readiness of the award as I kept waiting for notification.*
8. *That on 15th July, 2016 I was informed by Justinian Mushokorwa who was my Advocate that he was informed by the counsel for the Respondent one Mika T. Mbise that the award was delivered on 02nd June, 2016.*
9. *That on the same date that is 15th July, 2016 following notification by my advocate I went to the CMA and collected the copy of the award and signed in the CMA dispatch book. Annexed hereto and marked Annexure LM - 1 is a copy of the typed award for which leave is being craved for the same to form part of this affidavit.*
10. *That the Honourable Arbitrator decided in favour of the Respondent by dismissing the Complaint Number CMA/MBY/18/2010 in its entirety allegedly for lack of merit.*
11. *That I was totally aggrieved with the decision of the Honourable Arbitrator and desired to challenge the decision by way of Revision before this court.*
12. *That to facilitate lodging of the Application for Revision before this court, on 27th July, 2016 which was 12 days after collecting the copy of the award, my advocate wrote a letter to the CMA requesting handwritten notes or transcript. Annexed*

hereto and marked Annexure LM - 2 is a copy of the said letter for which leave is being craved for the same to form part of this affidavit.

13. *That unfortunately the requested documents were not availed to me until 17th August, 2016 when I filed Miscellaneous Application Number 12 of 2016 seeking extension of time to apply for revision but the Application was struck out by this honourable court on 30th June, 2017 on account of wrong citation with leave to file proper application within 14 days. Annexed hereto and marked Annexure LM - 3 is a copy of the drawn Order for which leave is being craved for the same to form part of this affidavit.*

14. *That on 13th July, 2017 I filed Miscellaneous Application Number 13 of 2017 seeking extension of time to apply for revision but the Application was struck out by this honourable court on 30th May, 2019 on account of defective affidavit and notice of application with leave to file proper application hence this application. Annexed hereto and marked Annexure LM - 4 is a copy of the Rulling for which leave is being craved for the same to form part of this affidavit.*

15. *That the delay to file an application for revision on time was due to failure of the CMA to avail me timely, with the requested documents which were to facilitate filing an application for revision.*

Mr Benendict was of the view that the issue for determination here is when the sixty days starts to be counted if at all the sixty days are applicable in the circumstances of the present application. He averred that paragraphs 13 and 14 of the affidavit as quoted above shows the legality as the reasons for the present application. He argued that when Miscellaneous Application number 12/2016 was filed, the respondent did not objected as being out of the sixty days, since it was filed within sixty days from the date the applicant was served with the copy of an award. The applicant Counsel was of the view that had the applicant not filed the application within 14 days as ordered, the applicant could have been limited by time for not complying with the court order. He further submitted that Miscellaneous Application No. 13/2017 was struck out on 30th May, 2019 on account of defective affidavit and notice of application with leave to file proper application.

He referred the decision of this court in ***Angelina Tairo v. Tanzania Breweries Ltd Miscellaneous Labour Application No. 10 of 2019 High Court of Tanzania Labour Division at Mbeya (Unreported)***. He also referred the decision of the court in ***Kalunga and Company Advocates v. National Bank of Commerce Ltd Civil Application No. 124 of 2005 Court of Appeal of Tanzania at Dar es Salaam (Unreported)***.

Before going through all submissions in detail, I wish to address some key legal issues that was raised by the respondent. The respondent Counsel in his submission contend and opposed that the

applicant has not properly moved this court since both Applicant's Affidavit is defective for breaching the provisions of the laws that is Order XIX Rule 3 of The Civil Procedure Code, (Cap. 33 R.E. 2009) and Rule 24(3) of The Labour Court Rules, (G.N. 106 of 2007).

He was of the view that, failure to comply with the mandatory legal requirements renders the Applicant's Application incompetent and therefore this Court is not properly moved. The question before me is that; is the affidavit that support the application defective or proper?.

I have keenly gone through the applicants' affidavit to see whether the document is defective or not. This means that this court to determine as to whether the application contravenes the provisions of the law and whether affidavit is defective. It is on the records that the earlier the applicant's affidavit was found by this court and the application was struck out for failure to comply with the legal provisos. One would have expected the applicant counsel to rectify the omission observed by this court, however, to my surprise the applicant has repeated the very similar mistake. I wish to reproduce and refer some of the paragraphs that appears to be defective. For instance paragraph six reads;

“... I was informed by the CMA officials that the then presiding arbitrator was reallocated (sic) from Mbeya Zone to Rukwa Zone before delivering the award and that I could be notified when the award was ready for collection”.

Similarly paragraph **8** of same Affidavit reads:-

“ That on 15th July, 2016 I was informed by Justinian Mushokorwa who was my Advocate that he was informed by the Counsel for the Respondent one Mika T. Mbise that the award was delivered on 02nd June,2016.”

Looking at some of the paragraphs it is clear that the affidavit does not clearly states clear fact and the applicant or deponent must state his own knowledge and not information from someone else. It appears that the applicant had no any knowledge on what is he was stating apart from relying on the information from other sources who are not reliable. Since these are key paragraphs to state the grounds for the application, one would have expected that the applicant could have been more serious in drafting hese paragraphs.

It is trite and the position of the law that the affidavit must clearly be confined to such facts fact and the applicant or deponent in his sworn statement must state his own knowledge and not information from someone else. I wish to refer Order XIX Rule 3 of The Civil Procedure

Code, Cap. 33 R.E. 202 which was also correctly cited by the respondent Counsel Mr Mbise. That provision of the law states that:-

*“(1) Affidavits shall be confined to such **facts** as the deponent is able of **his own knowledge** to prove, except on interlocutory applications on which statements of his belief may be admitted”*

Indeed the word “**shall**” under the above provision of the law implies mandatory as per the Interpretation of Law of Interpretation Act Cap 1 [R.E.2002].

Reading between the lines on the above provision of the Rules in line with the records of this court, it is clear that the applicant has not complied with the provision of the law. This was in contravention of the provisions of the law. In my considered view, since the applicant did not comply with the mandatory requirements of the law, it is as good as saying there is no application at this court. Now since the affidavit is defective, it means even the application is to support by the affidavit will also be defective. Reference can also be made to Order XLIII Rule 2 of the Civil Procedure Code, Cap 33 [R.E.2002]. Indeed this rule provides that;

*“Every application to the Court made under this Code **shall**, unless otherwise provided, be made by a chamber summons **supported by affidavit**”*

Reference can be made to the decision of the court in **Joseph Ntongwisangue another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005** (unreported) where it was held that:

“in situation where the application proceeds to a hearing on merit and in such hearing the application is found to be not only incompetent but also lacking in merit, it must be dismissed. The rationale is simple. Experience shows that the litigations if not controlled by the court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court”.

Reference can also be made to the decision of the court of Appeal of Tanzania in **The Director of Public Prosecutions v. ACP Abdalla Zombe and 8 others** Criminal Appeal No. 254 of 2009, CAT (unreported) where the court held that:

“this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings.”

Similarly, the Court in **ULEDI HASSAN ABDALLAH V. MURJI HASNEIN MOHAMED CIV. APPEAL NO. 2 OF 2012 [UNREPORTED]**

where the court held that:


“we are of the settled view that indeed the appellant did flout the mandatory procedural requirements, thus making this purported appeal incompetent”.

Now since the affidavit is incompetent the application cannot stand on its own without affidavit. This is as good as saying there is nothing can be regarded as an application in the absence of valid affidavit.

I am thus of the view that on account of the same defects there is no valid application on which this court can deal with it. From the foregoing brief discussion, I am of the settled mind that the purported application is incompetent and cannot stand as an application.

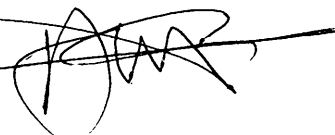
In the circumstance, since the applicant's application was invalid, it could not have founded a proper forum before this court. For the reasons stated above, the application is misconceived. From my findings and reasons I have given above, I am of the settled view that since the application before me is incompetent, what then follows is to strike it and I hereby struck it out. It is so ordered.




DR. A. J. MAMBI
JUDGE
17.06. 2020

Ruling delivered in Chambers this 17th of June, 2018 in presence of both parties.




DR. A. J. MAMBI
JUDGE
17.06. 2020