

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)**

AT IRINGA

REVISION NO. 08 OF 2019

BETWEEN

NYACHIA R. WARUCHA

APPLICANT

VERSUS

THE NEW FOREST COMPANY

(T) LTD

RESPONDENT

Date of Last Order: 22/10/2020
Date of Ruling: 12/11/2020

RULING

MATOGOLO, J.

The applicant one Nyachia R. Warucha has filed this application for revision.

The application is seeking for an order of this court to revise the proceedings of the Commission for Mediation and Arbitration of Iringa in Labour Dispute No. CMA/IR/66/2019, quash and set aside the ruling thereon.

The application was brought by both the Notice of Application and chamber summons. The same is supported by an affidavit taken by the applicant himself.

After being served, the respondent filed counter affidavit taken by Moses Ambindwile and also raised preliminary objection on point of law as follows:-

- 1) That, the application is time barred.
- 2) That, the Applicant's application is defective for non compliance of Rule 24(3)(a)(b)(c) and (d), of the Labour Court Rules, GN. No. 106 of 2007.

Basing on the notice of preliminary objection raised, this court invited the parties to argue on the same before going to the merits of the application.

At the hearing the applicant was represented by Mr. George Mhanga learned advocate and the respondent was represented by Mr. Moses Ambindwile learned advocate. It is the contention of Mr. Moses Ambindwile learned counsel that the award by the CMA was delivered on 21/03/2020. But the applicant filed this application for revision on 02/04/2020.

He said Section 91(1) (a) of the Employment and Labour Relations Act, No. 6 of 2004 (Cap. 366 R. E. 2019), provides time limitation for a person who is aggrieved with an award by the CMA is six weeks from the date when the award was made to the date the application is filed before the court. He said the applicant delayed to file his application because he was supplied with the copy of an award the same day it was delivered. He said the application was lodged after the expiry of six weeks.

The applicant endorsed on the CMA award acknowledging receipt of the said award. Mr. Moses Ambindwile submitted further that he is aware that the applicant previously has attempted to file similar application within time, Labour Revision No. 3 of 2020 on 22/06/2020 but the same was struck out by this court (Hon. Kente, Judge) because of incompetence of such application. But the applicant has to comply with the law governing time limitation as he was out of time. Mr. Ambindwile submitted further that Hon. Kente, Judge did not permit the applicant to file a fresh application without considering time limitation. That when the application is declared incompetent a party cannot apply to withdraw or seek leave for refileing the same. The only remedy available is for it to be struck out. The applicant was supposed to file fresh application but subject to time limitation. Mr. Ambindwile supported his contention by citing the case of ***Zaina Lyelu vs. Basola Lumato and Another*** Civil Application No. 3 of 2011 CAT at Iringa (unreported).

Regarding the second point of objection Mr. Ambindwile argued that the application is defective for contravening Rule 24(3)(a)(b)(c) and (d) of the Labour Court Rules. There are missing facts which are required to be inserted in the chamber summons. He mentioned them to be the name description and address of the parties although the same is not fatal as in the last part the same are contained. However he said the requirements under paragraphs (b) (c) and (d) are paramount but the applicant's affidavit has no such ingredients.

He therefore argued that absence of those ingredients renders the whole affidavit not to exist. And that an application without an affidavit supporting the same lacks legs to stand on. He cited the case of **James Daniel vs. Cats Net Limited**, Revision No. 258 of 2017 High Court Labour Division Dar Es Salaam (unreported) at page 14 the court found that the application was incurably defective. He therefore prayed to this court to dismiss the application.

On his part Mr. George Mhanga learned advocate submitted that he is aware of the requirement for time limitation for filing an application for revision of the award by the CMA. But their first application was filed on 02/04/2020. After being struck out they prayed for leave to refile the same for that case they are not time barred per order of this court (Hon. Kente, Judge) of 02/06/2020 which granted the applicant leave to refile the application although he did specify the time limit. He argued that they would have been out of time if they would have been given time frame without filing the application. He said where the order of the court did not specify time limit to refile the application the law requires that the same should be filed within sixty days as it was held in the case of **Mount Meru Hotel vs. Flora Michael Luhamwa** Revision Application No. 57 of 2019. Mr. Mhanga argued that when Hon. Kente, Judge, ordered the applicant to refile his application he was aware of that and the intention was to avoid multiplications. He also referred the case of **Hamis K. Mtanziha and 17 Others vs. Oxfarm and Salu Security Services Ltd**, Revision Application No. 7 of 2020 in which Mgeta, Judge accepted the prayer to

refile the application to avoid the possibility of the applicant being forced to apply for extension of time. He therefore submitted that since they filed first application in time it is that is why the court did not hesitate to grant them leave to refile the application without further applying for extension of time. He therefore prayed for the first point of objection not to be considered. As to the second point of objection Mr. Mhanga submitted that it is the current law of the land that courts are to uphold the need to dispense justice rather than being tied up with technicalities in the administration of justice. For their application having not shown statement of legal issues and reliefs sought is not fatal at all. It is just a mere procedural technicality which does not even shake the jurisdiction of the court since the affidavit has shown what the applicant is praying for and the court, has the jurisdiction to entertain the matter, that is to quash a little award by the CMA. The rest are mere technicalities which the court can disregard by applying the principle of overriding objective.

He said the case cited by Mr. Moses Ambindwile was decided before the Written Laws (Miscellaneous Amendments) Act No. 2 of 2018 which requires courts to decide cases justly and regard to substantial justice. He thereof prayed for the raised preliminary objection to be dismissed and the court proceed with hearing of the main application.

In rejoinder Mr. Ambindwile did not agree that this court granted the applicant leave to refile the application. There is no such order by Honourable Kente, Judge indicating the extent of leave raised by the applicant. That, there cannot be a leave without specifying time. He said

even the case of **Mount Meru Hotel** is irrelevant as in this case the court granted leave to refile though did not indicate for the period to refile.

Regarding the case of **Hamis Mtanzika** leave to refile was granted and time limit was given for the duration of such leave. With regard to the second point Mr. Ambindwile said the counsel is not contesting what he has submitted on the lacking ingredients. And he prayed for the principle of overriding objective not to be considered as the same cannot violate procedural law. The said amendment did not amend rule 24(3)(b) (c) and (d). The provision forming basis of this objection had not been amended which is to be complied with.

Having read the submissions by the respective counsel for the parties, I will start with the first point of objection that the application is time barred. It is a common ground that Section 91(1)(a) and (b) of the Employment and Labour Relations Act requires an application to this court against the award by the CMA to be filed within six weeks from the date the said award is served upon the applicant. The CMA award in respect of this application was served upon the applicant on 31/03/2020. The present application was filed on 02/06/2020. By simple mathematics it was lodged beyond the six weeks provided under the law. That too is not in dispute. But the applicant's argument is that their first application, Revision No. 03 of 2020 was filed on time, that is on 02/04/2020. But the same was struck out on 02/06/2020 with leave to refile but there is no specific period was given for them to refile. For that case the applicant was supposed to refile the application within sixty days.

The applicant's counsel has alleged that this court, honourable Kente, Judge granted them leave to refile the application. In my perusal to the court record I was unable to see that ruling of this court striking out the application and granting leave to the applicant to refile the same. The learned counsel for the applicant did not supply a copy for this court to go through and ascertain what has been put up by the learned counsel in his submission. If so it is not the duty of this court to search for the said ruling in support of a party's case. Contrary to what Mr. George Mhanga has submitted, Mr. Ambindwile argued that this court in Revision No. 3 of 2020 did not grant leave to the applicant to refile the application as even the said ruling was not annexed to the applicant's affidavit.

Ordinarily where a court grant leave to refile a matter must specify time frame within which the application is to be refile. The court cannot leave open to the applicant to refile the application at the time as he wishes. The contention by applicant's counsel is not supported by the court record. After his application was struck out for being incompetent the applicant was bound to prove that the present application was filed within the period prescribed in the ruling by this court if it was so prescribed. Otherwise applicant was required to apply for extension of time before he has refiled this application. But there is no evidence by the applicant to prove that. Under such circumstances, and as there is time limit for filing applications to this court from the award by the CMA which is five weeks, by filing the same beyond such period it is obvious that, the applicant is

time barred under Section 91(1)(a) of the Employment and Labour Relations Act. Point No. 1 of objection is sustained.

Regarding the second point of objection that the application is incurably defective for non compliance to Rule 24(3)(a)(b)(c) and (d) of the Labour Court Rules, this appears not to have been contested by the applicant's counsel. But he only relied on the principle of overriding objective. Rule 24(3) of the Rules provides:-

"The application shall be supported by an affidavit which shall clearly and consciously set out.

- (a) The names description and addresses of the parties.*
- (b) A statement of the material facts in a chronological order on which the application base.*
- (c) A statement of legal issues that arise from the material facts and*
- (d) The reliefs sought"*

Upon going through the affidavit supporting the applicant's application, the same does not set out the requirements listed in the rule above reproduced.

The rule is couched in mandatory form due to the word "shall" used which according to Section 53(2) of the Interpretation of the laws of Act Cap.1 R. E. 2019, which provides:-

"53(2) where in a written law the word "shall" is used in conferring a function such word shall be interpreted to mean that the function so conferred must be performed"

See also the case of **Mwita Sigore @ Qgora vs. Republic**, Criminal Appeal No. 54 of 2008 CAT (unreported).

The learned counsel for the applicant has invited this court to invoke the principle of overriding objective so that it can confine itself to the substantive justice.

This principle is not new one although it appears to have been brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act of 2018. The elements of overriding objective principle has been there even before the enactment of the law that brought it. Take for example Article 13(6)(a) and Article 107A (2)(e) of the Constitution. But also see the case of **Ramadhan Nyoni vs. M/S Haule and Company, Advocates (1996) TLR 71** where this court (Mkwawa, Judge) has this to say:-

In a case where a layman, unaware of the process of the machinery of justice tries to get relief before the courts, procedural should not be used to defeat justice and the irregularities in an affidavit are curable in term of Section 95 of the Civil Procedure Code".

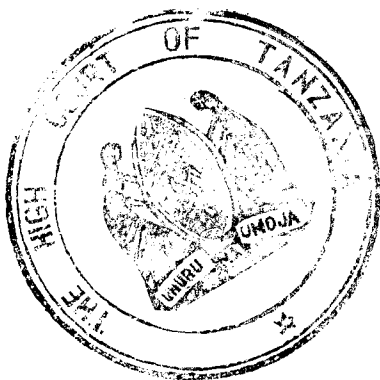
The Court of Appeal of Tanzania has emphasized on that principle in the case ***Yacobo Magoiga Gichere vs. Peninah Yusuf*** Civil Appeal No. 55 of 2017 CAT at Mwanza. But the same court in the case of ***Mondorosi Village Council and 2 Others vs. Tanzania Breweries Limited and 4 Others***, Civil Appeal No. 66 of 2017 CAT at Arusha followed its previous decision in ***Njake Enterprises Limited vs. Biue Rock Limited and Another***, Civil Appeal No. 69 of 2017 clearly stated that the principle of overriding objective cannot be used against mandatory procedural law.

A party therefore cannot seek refuge to the principle while he violated mandatory procedural law. The principle of overriding objective was not intended for such circumstances. But it is applicable to befitting cases. I also find merit in this point of objection.

In the event and basing on the reasons given above I am constrained to agree with Mr. Moses Ambandwile learned advocate that the application is time barred but also bad in law for violation of the mandatory required provided under rule 24(3) (a)(b)(c) and (d) of the Labour Court Rules, 2007 the same is hereby struck out.

It is so ordered.

DATED at IRINGA this 12th day of November, 2020.




F. N. MATOGOLO

JUDGE

12/11/2020

Date: 12/11/2020

Coram: Hon. F. N. Matogolo – Judge

Applicant: Absent

Respondent: Absent

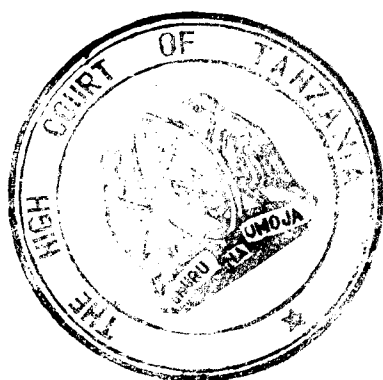
C/C: Grace

Mr. Suleiman Kaganda – Advocate:

My Lord I am representing the applicant. But I am also holding brief for Mr. Moses Ambindwile advocate for the Respondent. The matter is for ruling we are ready to receive it if is ready. That is all.

COURT:

Ruling delivered.




F. N. MATOGOLO

JUDGE

12/11/2020