IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

(MISC.LABOUR APPLICATION NO. 3 OF 2019

(Arising from the decision of CMA-Tabora Labour Dispute No. CMA/TAB/ARB/02/2018)

YOHANA MAGANJIRA & 31 OTHERS ..... APPLICANTS

VERSUS

TANZANIA LEAF TOBACCO COMPANY LTD ..... RESPONDENT

RULING

KIHWELO, J.

The ruling in this matter was reserved by my late brother, Bongole, J, who suddenly fell ill and died on the night of 15th July 2020 and could not leave to compose this ruling. The record has now been re-assigned to me.

This is an application for condonation which was drawn by KILINGO HASSANI and filed by YOHANA MAGANJIRA on behalf of others seeking for enlargement of time to file application for revision out of time. The application was supported by the affidavit sworn by the said YOHANA MAGANJIRA. Apparently, armed with that application, the respondent, represented by MUSSA KASSIM of RMK Advocates Chambers, resisted the application by a number of preliminary objections on points of law as follows:

"1. That the affidavit in support of chamber summons is incurably defective for contravening Rule 24(3) of the Labour Court Rules, 2007; and

2. That the Applicant's notice of application is incurably defective for contravening Rule 24(2) of the Labour Court Rules, 2007."

Before this Court the applicants were represented by KILINGO HASSANI, learned counsel while the respondent was represented by MUSSA KASSIM, learned counsel. With the consent of the parties the preliminary objection was disposed through written submissions which were dully filed by the parties in compliance to the schedule directed by the Court.

In support of the preliminary objections, the learned counsel for the respondent argued that the affidavit in support of the application did not meet the mandatory requirement of Rules 24(1)(2)(3), 56(1) of the Labour Court Rules, 2007 GN. No. 106 of 2007 (Henceforth "the Rules"). He valiantly argued that the applicant's affidavit in support of the application has four (4) paragraphs and none of those contains addresses of the parties, do not raise any legal issues and there is no paragraph showing reliefs prayed for. To hammer his point close home, he cited the provisions of Rule 24(3) (a), 24(3)(c) and 24(3)(d) of the Rules. He forcefully argued that the provisions cited above use the word "shall" which implies mandatory requirement as

provided for by section 53 of the Interpretation of Laws Act, Cap 1 R.E 2002 (sic) and that the applicants have no discretion to comply or not to comply with the mandatory requirements of the law.

Amplifying in support of the second preliminary objection the respondent vehemently argued that the Notice of Application filed by the applicant did not substantially comply with Rule 24(1) of the Rules. He strenuously argued that, in the circumstances there is no notice in the eyes of the law and therefore the application is incompetent and therefore it should be struck out.

In reply the applicant argued that the submission is misconceived and intended to mislead the court and a waste of time of the Honourable Court. He forcefully argued that the so called, preliminary objections in fact does not meet the test of a preliminary objection and went ahead to cite the celebrated case of **Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd** [1969] EA 696 which is the landmark case that defined what is a preliminary objection. He further referred to the case of **Musanga Ng'andwa v Chief Japhet Wanzagi and Eight Others** (2006) TLR 351 where the term preliminary objection was further clarified. The learned counsel argued that based upon the two cited case above a preliminary objection has to meet three criteria. **One**, it has to be purely on point of law, **Two**, it should not depend upon courts discretion and **Three**, it needs no evidence to prove it. Based on those three criteria the learned counsel for the applicants contended that the objections raised by the respondent does not fit into any of those as all contents required under rules 24(2) and (2) of GN. No. 106 of 2007 were clearly spelt out and

therefore what remains of the respondents, preliminary point of objections are mere facts which depends upon the discretion of the Court.

Needless to say, the main contention in this matter is on the competence of the application for condonation before this Court. I think it is appropriate here to recapitulate briefly the law on this matter. It is not in dispute that the present application is brought under rule 24 of the Rules. I will quote that rule more in particular the most relevant sub-rules to this application.

"24(1) Any application **shall** be made on notice to all persons who have an interest in the application.

(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-

(a) the title of the matter;

(b) the case number assigned to the matter by the Registrar;

(c) the relief sought;

(d) an address at which that party will accept notices and service of all documents in the proceedings;

(e) a notice advising the other party that if he intends to oppose the matter, that party shall deliver a counter affidavit within fifteen days after the application has been served, failure of which the matter may proceed ex-party; and

(f) a list and attachment of the documents that are material and relevant to the application.

(3) The application **shall** be supported by an affidavit, which shall clearly and concisely 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 is based;

(c) a statement of the legal issues that arise from the material facts;

and

(d) the reliefs sought.

The catchword in the section is "**shall**" which I have deliberately underlined. In ordinary legislative language, the word **shall** implies a **mandatory** requirement in so far as that goes to the root of the matter. See for instance, the decisions of the Court of Appeal in **Victor Bushiri and 135 Others v. AMI Tanzania Ltd,** Civil Application No. 64 of 2000 and **Arcado Dennis Ntagazwa v. Buyogera Julius Buyambo**, Civil Appeal No. 51 of 1996 (both unreported). So, as rightly pointed out by the respondent when the words of a statute are couched in mandatory terms then such words must be construed strictly and not to be taken blindly against the mandatory provision of the procedural law which go to the very foundation of the case. I am also alive to the principle that whether or not the term "shall" imported a mandatory requirement depended on the circumstances of any particular case. But the circumstances in the case

under consideration I think were meant to be strictly mandatory and not otherwise.

I must respectfully confess more in sorrow than in fear that I have found the submission by the respondent that the preliminary objection is misconceived and intended to mislead the court and a waste of time of the Honourable Court unconvincing. The instant preliminary objection is neither misconceived nor misleading and therefore this should not detain me much.

Consequently, I find merit in the preliminary objections, and the same is accordingly sustained. The application before this Court is defective and therefore it is struck out. No order as to costs. Order accordingly.

P. F. KIHWELO

JUDGE

10/12/2020

Ruling to be delivered by the Deputy Registrar on a date to be fixed.

P. F. KIHWELO

JUDGE

10/12/2020

Date : 17/12/2020
Coram : B.R. Nyaki – DR
Applicant : 1st Respondent, the rest absent
Respondent: Mr. Musa Kassim, Advocate for the Respondent.
Bench Clerk: Grace Mkemwa, RMA

Court: Ruling delivered this 17th day of December, 2020 in the presence of the Mr. Musa Kassim, Advocate for the Respondent and the 1st Applicant.

Right of Appeal explained fully.

B.R. Nyaki
DEPUTY REGISTRAR
HIGH COURT TABORA