IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

APPLICATION FOR REVISION No. 69 OF 2019

DIOCESE OF VICTORIA NYANZA

ISAMILO INTERNATIONAL SCHOOL..... APPLICANT

VERSUS

PHILIP I. MASAMBA..... 1ST RESPONDENT

NYANDA. JOSEPH SAMA ..... 2ND RESPONDENT

HILDAGARD MBOYERWA ..... 3RD RESPONDENT

RULING

10th September & 17th December, 2020

TIGANGA, J.

Through a Notice of Application and Chamber Summons supported by an Affidavit sworn by Rt. Rev. Godrey Kibuka Mbelwa, who introduced himself as a care taker Bishop of Victoria Nyanza and a Trustee of the Registered Trustee of the Anglican Church of Tanzania, the applicant the Diocese of Victoria Nyanza (Isamilo international School), moved this court under section 91 (10 (a) and (b), section 91 (2) (a) and (b) and section 94 (1) (b) (i) of the Employment and Labour Relations Act No. 06 of 2004 and Rules 24 (1) (2) (a), (b), (c), (d), (e) and (f), 24 (3) (a) (b) (c) and (d)

and 28 (1) (c) and (d) of the Labour Court Rules, 2007 GN. 106 of 2007 to call for and revise the award issued by the commission for Mediation and Arbitration af Mwanza dated on 18th June 2019 in Consolidated Labour Dispute No. CMA/MZ/NYAMA/433, 434 and 435 by Hon. Mwebuga, Arbitrator on the following grounds that;

i. The decision made by Mr. Mwebuga, Arbitrator was made against unincorporated entity which is not capable of suing and being sued in their names.
ii. The decision of Hon. Mwebuga was erroneous in the absence of any proof that the respondents were employed by the applicant.
iii. The decision by Hon. Mwebuga, Arbitrator was erroneous in that the said disputes were wrongly and illegally consolidated thus causing hardship on the part of the employer on defending them.
iv. The decision by Hon. Mwebuga Arbitrator is illegal for considering extraneous matters not forming part of the record.
v. The decision by Hon. Mwebuga, Arbitrator was delivered erroneously for failure to consider evidence to support charges against respondents.
vi. The learned Arbitrator made a grave error in holding that all charges against the employees were not proved.
vii. That the arbitrator erred in disqualifying the chairman of the disciplinary committee.

viii. That the arbitrator erred in holding that the employees were not afforded right to be heard.

ix. The decision by Hon. Mwebuga, Arbitrator erred to hold that the termination was unlawful and erroneously reached without proper basis.

The court was also asked to make any other order as may deem fit. The grounds for application are reflected in paragraph 6 of the affidavit, which in essence reiterates the same grounds as contained in the Notice of Application and chamber summons as presented in items (i) - (ix) above.

The application was opposed by the respondent who filed an eleven paragraphed counter affidavit, which was accompanied with a notice of preliminary objection with four points as follows;-

a) That the application was incurably defective thus bad in law for arising from non existing decision or award.
b) That the affidavit in support of the application is defective for containing new annextures not part of CMA proceedings.
c) The affidavit in support of the application is defective for want of proper signature of the deponent.
d) The affidavit in support of the application is defective for containing an improper durat of attestation.

At the hearing of the preliminary objection, parties were represented by Advocates, Mr. Julius Mushobozi, Advocate, appeared representing the respondent and Simeo Mazula, Advocate, appeared representing the applicant. Mr. Julius Mushobozi, learned counsel in support of the objection submitted that the affidavit in support of the application has not been properly verified and attested, he cited the defect at page 3 of the Notice of Application, the applicant gave notice that the application will be supported by the affidavit of **Bishop Godfrey Kibuka Mbelwa,** while at page 10 of the Notice, they said the affidavit was sworn by one **Godrey Kibuka Mbelwa**.

At page 12 of the document at the dating, which reads "dated at Mwanza" there are two words one reading **Godfrey Mbelwa**, while at page 13, the verification clause reads, **Godfrey Godfrey Mbelwa**. At the attestation clause, there is a name **Godfrey**. In support of that contention, Mr. Mushobozi submitted that, there are a lot of inconsistencies in referring the person who swore an affidavit in support of the application. According to him, that creates doubt on who is the proper person whether **Godrey** or **Godfrey** who swore the affidavit filed in support of the application. He submitted that the said inconsistencies in the affidavit cannot be ignored,

however minor they can be, since a sworn affidavit is not a document to be treated lightly, if it contains an obvious falsehood, it naturally becomes a suspect. To support that argument he cited the case of **Bitaitina vs Kananura** [1977] UGCD, volume 20, a Ugandan decision which he prayed to be persuasive.

He submitted that although he is not an expert in handwriting, but the court may make comparison of the signature. He said that exhibit P1 at the CMA, may assist in that comparison. He prayed the application to be struck out for those short comings.

In his submission in reply Mr. Mazula, learned counsel submitted that conceded that if you look at page 3 of the affidavit, it has been said that the deponent will be Godfrey Kibuka Mbelwa, while at page 12 there are words if you read them they are Godfrey Mbelwa, while at page 13 there are words Godfrey Godfrey Mbelwa. He submitted that regarding the doubt shown by an advocate, he asked the court to look at the record to clear the doubt.

Mr. Mazula submitted further that, it is a principle in **Mukisa Buscuit Manufacturing Co. Ltd vs West End Distributors Ltd** [1969]

EA 696 case that, the preliminary objection must be a pure point of law, not facts which need evidence. According to him, the Advocate for the respondent is asking to make further reference by calling a person who signed the affidavit to confirm as to whether the person is the one who signed the document. He submitted that if that is a point, then the raised point of objection lacks merits as the same needs evidence which makes them the point of fact. Following that weakness he asked this court to disregard the objection and proceed to hear the application, as entertaining this kind of objection is wastage of time and delaying the justice.

He reminded this court that its duty is to determine the right of the parties not to punish the litigants if they do mistake in pleadings. He cited me a persuasive authority in the case of **East Africa Cables Limited vs Spencon Service Limited**, Commercial Case No. 42 of 2016 at page 3, where my Senior brother Hon. Mruma, J borrowed leaf from Bowen, L, J, in the case of **Cropper vs Smith** [1984] CH. D 700. That the duty of the court is to determine the rights of the parties, and asked the court to overrule the objection, for if it will struck out the application, that will be against the principle in the case above, and the court will be abdicating its duty. In further fostering the argument Mr. Mazula, cited the decision in

the case of **Felista Mtoka vs Equity for Tanzania (EFTA) Limited**, Civil Case No. 17 of 2018, in which my Senior brother Hon. Rumanyika, J, where there was an error in the names, this court overruled the objection which based on typographical errors in the names, basing on the overriding objective principle.

The counsel persuasively, argued that where there is an issue of procedure vis a vis substantive justice, then courts are enjoined to base on the substantive part. He submitted that the point of objection has no merit, but if there is a finding that if the court is of the view that the objection has merit, and goes to the root of the matter, then it shall struck it out with leave to refile.

He asked the court to disregard and distinguish the decision of Uganda cited by the counsel for the same is not good law. In the winding up he asked the court not to allow the technicality to override substantive justice.

In rejoinder Mr. Mushobozi insisted that the objection is purely a point of law in the sense that, the affidavit is itself evidence and the duty of the court is to look into the manner in which the evidence is presented.

He submitted that an affidavit is not a pleading. He insisted that there cannot be a typographical error even of the signature and the court has not been told whether Godfrey and Godrey are typographic errors or otherwise. He submitted that the principle in the case of **East African Cable** (supra) is distinguishable as the plaintiff in that case did not sign the plaint, but the affidavit must be signed by the deponent. He submitted that if the affidavit will be accepted as it is, it will cause injustice to his client.

Now having summarized comprehensively, the grounds and arguments of objection, it goes without saying that both parties are in agreement that, the complained of anomalies in the affidavit are real. As highlighted that page 3 of the notice of application, the court is notified that the application will be supported or is supported by an affidavit of **Bishop Godfrey Kibuka Mbelwa** and so is the chamber summons at page 8 of the record.

However, the affidavit itself in its opening paragraph introducing the swearing person shows that it was sown by **Rt. Rev. Godrey Kibuka Mbelwa**, that is at page 10 of the record instituting the application at page 13, still said affidavit is verified by **Rt. Rev. Godrey Kibuka Mbelwa**, and so is the jurat of attestation.

because if it passes the test, it is presumed to be the evidence capable of being used to prove the facts in question. It must in my considered view be free from any doubt.

The affidavit in support of this application, has two nagging doubts which stands unresolved, these doubts, as earlier on pointed out, relates to the identity of a person who swore it, and the signatures at the verification and jurat of attestation. With these doubts, the same cannot be taken to have the quality of supporting an application.

The law that is Order XLIII Rule 2 of the Civil Procedure Code [Cap 33 R.E 2019] requires every application to be filed by chamber summons supported by an affidavit. In this case the affidavit purported to be filed in support of the application is not an affidavit worth a name, as it has no quality of being an affidavit known at law.

The same is defective in substance, the defect which goes to the root of it, and therefore it cannot by any means be cured, neither by the authorities cited which are in essence distinguishable in the circumstances of the case at hand, nor by the overriding objective principle. The application is thus struck out for the reason given.

I am aware that the applicant has asked for leave to refile this application, I find the prayer to be untenable at this stage, as had he been the one asking to withdraw the matter after noticing the defect, that prayer would have been entertained, but since the struck out is a result of the objection raised, argued and sustained, the prayer cannot be entertained.

However the order striking out any matter in court gives room for the party against whom it is made to refile the matter in court. Likewise the applicant in this application may do so but subject to the law of limitation.

It is so ordered.

DATED at **MWANZA** this 17th December, 2020

J. C. TIGANGA

JUDGE

17/12/2020