

THE UNITED REPUBLIC OF TANZANIA

THE JUDICIARY

(HIGH COURT LABOUR DIVISION)

AT TANGA

LABOUR REVISION NO.6 OF 2019

(Original from the Commission for Mediation and Arbitration for Tanga at
Tanga via Dispute No.CMA/TAN/72/2014)

BETWEEN

KILINDI DISTRICT COUNCIL APPLICANT

VERSUS

1. MUSSA NYEJI

2. KILINDI DISTRICT EXECUTIVE DIRECTOR...RESPONDENTS

RULING

MRUMA, J.

The Applicant Kilindi District Council Filed Miscellaneous Labour Application No.6 of 2019 for Orders that:

1. This honorable court be pleased to set aside the arbitration award or any order provided [sic] threats which compels the second Respondent to pay his [sic] person debts of the Applicant's revenue whereby the Applicant is a third party to this suit or subsequent former application.

2. This honourable court be pleased to declare that the order which compels the 2nd Respondent to execute the court order upon taking applicant's fund to be null and void
3. This honourable court be pleased to set aside the Arbitral Award which was improperly procured.
4. The court gives any other reliefs(s) and orders that it may deem just and equitable.

Upon being served, the 1st Respondent filed a notice of opposition made under Rule 29(3) (e) and 29(5) (a) and (b) of Labour Institutions (Mediation and Arbitration) Rules of 2007 and any other enabling provisions of the law. Together with the notice of opposition the 1st Respondent has raised six preliminary objections contending that:

- i. That the honourable court has been improperly moved;
- ii. The Applicant has no locus standi in the matter;
- iii. That the Representative for the Applicant has no locus standi in the matter;
- iv. that the Application is time barred;
- v. that the application is baseless and unfounded and'

vi. That the Application is on about of court procedures.

Submitting in support of the 1st preliminary objection counsel for the Respondent, Mr Hamza Yusuf contended that this application contains three prayers which have been brought under different provisions the law involving two pieces of legislations. The learned counsel has argued this court to find this application untenable and struck it out on that ground only. He referred this court to the decision of the Court of Appeal in the case **Rutagatina C.L. versus The Advocate Committee and Clavery Mtindo Ngalapa [CAT –Civil Application No. 98 of 2010]** and in **Mohamed Salmin vs. Jumaine Omary Mapesa Civil Appeal No. 103 of 2014.**

Submitting in support of the second preliminary objection, Mr. Hamza has contended that Mr. Mutalemwa Tafsa, the District Solicitor of Kilindi District who has been appointed and authorized as Personal Representative of the Applicant has conflict of interest in the matter. The counsel stated that Mr. Mutalemwa was the advocate for the 2nd Respondent in execution proceedings involving the same parties therefore he cannot turn around and represent the Applicant in a case against his own former Client i.e. the Second Respondent.

The learned Counsel cited section 7 of the Notaries Public and Commissioner for Oaths Act [Cap. 12 R.E. 2002] which provides that:

“No Commissioner for Oaths shall exercise any of his powers as a Commissioner for Oaths in any proceeding or matter which he is advocate to ay of the parties or in which he is interested”

The counsel argued this court to find that Mr. Mutalemwa had interest in the matter therefore not qualified to act as a Personal Representative of the Applicant.

Submitting in respect of the third preliminary objection Mr. Hamza submitted that under section 91(1) (a) of the Employment and Labour Relations Act No.6 of 2004 any party who alleges defect in any arbitration proceedings must apply to the High Court (Labour Court) within six weeks of the date the award was served on him. It is the contention of the learned counsel that the present application was filed three years after the delivery of the ex-parte award. Apparently the Respondent’s Counsel did not argue grounds (ii), (v) and (vi).

Responding to the submissions of the Respondent’s Counsel Mr. Mutalemwa contended that the first preliminary objection raised by the Respondent’s Counsel is bound to fail on two grounds. First, the learned solicitor contends that the submissions of the Respondent’s Counsel have been diverted from the objection raised which was about the omnibus nature of the application and secondly. It is the learned counsel’s contention that the preliminary objection raised is not a pure point of law

as required by the principle laid down in the case of **Mukisa BiscuitsManufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA. 696.**

With regards to the second preliminary objection Mr. Mutalemwa contended that the second preliminary objection is misconceived because while the point raised basically deals with locus standi of the Representative the arguments by the counsel for the Respondents were geared towards conflict of interest. Furthermore the learned solicitor submitted that the citation of the Notaries Public and Commissioner for Oaths Act [Cap. 12 RE. 2002] as basis of the preliminary objection was a misconception because the respondent's counsel didn't cite specific provision under which his objection was based.

Regarding his locus in the proceedings Mr. Mutalemwa submitted that being employed as a solicitor of Kilindi District Council he has locus to enter appearance for the council funder section 18(5) of Cap.268.

Responding to the third preliminary objection the learned solicitor submitted that the instant application is objection proceedings which is instituted u/s 8 (e), 95, Order XXI Rules 57, 59, 62 and 101 of the Civil Procedure Code. He stated that objection proceedings under the above provisions of the law are not regulated by section 91 (1) (a) of the Employment and Labour Relations Act, 2004.

I beg to start with the first preliminary objection which is to the effect that this court is improperly moved. The gist of this point is that the application is incompetent for combining more than one unrelated applications in one chamber summons.

Having carefully examined the chamber summons and the reliefs sought therein, I agree with the 1st Respondent's counsel that the application is incurably defective. The application is seeking three distinct reliefs under different pieces of legislations in one chamber summons. The reliefs sought are:-

- (i) Setting aside an arbitral award
- (ii) Declaring that an order compelling the second Respondent (Kilindi District Executive Director to execute a court Order by using the Applicant's fund is null and void; and
- (iii) An order setting aside the arbitral award which was improperly procured.

Enabling laws cited to move the court are Rules 24(1) (2)(a)(b)(c)(d)(e) and (f) and Rules 24(3)(a)(b)(c) and (d), 24(1), 55(1) and (2) of the Labour Court Rules GN No.106 of 2007 and Order XXI Rules 57, 59, 62 and 101 and sections 68(e) and 95 of the Civil Procedure Code [Cap.33 R.E 2002]. A look at Rule 24 of the Labour Court Rules shows that the entire Rule (i.e. Rule 24(1) – (12)) deals with applications before the court and how it's made. Rule 55(1) and (2) is on inherent powers of the court where proceedings have arisen which the rules do not cover.

On the other hand Rule 51 of Order XXI of the Civil Procedure Code [Cap. 33 R.E. 2002] caters for investigations of claims to attachment of attached property and postponement of sale. Rule 59 deals with release of property from attachment, and 62 is about instituting a suit to establish any right over an attached property, same as rule 101. Thus, provisions of the law cited by the Applicant are from distinct legislations and do not cater for the remedies sought in this chamber summons. In view of the above cited provisions of the law and prayers contained in the chamber summons, I am of the view that the application is an omnibus application. It is an omnibus application because it contains district prayers under different legislations in one chamber summons. In the case of **Mohammed Salmini vs. Jumanne Omary Mapesa Civil application No. 103 of 2014** the Court of Appeal held that an application which combines two or more unrelated application is incompetent. That point alone would suffice to dispose of this application by striking it out. However I find it not harmful to proceed to discuss the two other preliminary points as I find them equally meritorious.

Starting with the second preliminary objection; it is important to reiterate that it is a fundamental right to a litigant to have legal representation of his/her own choice. In some cases, however particularly civil, the right may be put to serious test if there is a conflict of interest which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationship or where the advocate would double up as a witness. Section 7 of the Notaries Public and Commissioner for Oaths Act [Cap. 12 R.E. 2002] provides that:

“No commissioner for Oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is advocate to any of the parties or in which he is interested”

The aforesaid provision of the law, attempts to guard against conflicts of interest. An advocate (including a solicitor) will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which are not compatible or serves or attempts to serve two or more interests which are not able be served consistently or honours or attempt to honour two or more duties which cannot be honoured compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients. Conflict of interest can arise broadly when an advocate acts for two parties on the same side of the record in litigation or an advocate acting against a former client having previously acted for that party in a related matter where his own interest is involved.

In the instant case there is no dispute that Mr. Mutalemwa acted for the 2nd Respondent in this same matter in different stages. To act when you have a conflict of interest involves breaching your fiduciary duty to you client or former client. Mr. Mutalemwa being an employee of Kilindi District Council (The Applicant herein), and having acted both for Kilindi District Council which is under the Kilindi District Council Executive Director the second Respondent herein under which Mr. Mutalemwa works), clearly has conflicting interest in the matter. He cannot justifiably act against his former client – the Executive Director of Kilindi District Council who is his boss in office but who is now joined as the 2nd Respondent.

That said, it is my finding that the fact that Mr. Mutalemwa had previously represented the second Respondent Kilindi district executive director (who is also his boss in office) is prejudicial to the other parties and to the ends of justice. This objection too is merited.

Finally there is the issue of Limitation of time. Under section 91(1) (a) of the Employment and Labour Relations Act No.6 of 2004 an application to set aside an arbitral award must be filed within six weeks of the date of the impugned award. As correctly submitted by the counsel for the Respondent the issue of Limitation touches on the jurisdiction of the court; Courts cannot have jurisdiction on matters which are instituted after the prescribed time. Time Limitation is a pure point of law. The impugned Award was handed down on 6th June 2017 and the present application was presented for filing on 18th February 2019 which is over two years thereafter. Thus, the application is clearly time barred. This point too is with merits.

In the final analysis all points of preliminary objection raised are upheld. Miscellaneous Labour Application No.6 of 2019 is struck out. As this is a labour dispute I make no orders as to the costs.



A handwritten signature in black ink, appearing to read "Mr. Mruma", is positioned above the printed name.

A.R. MRUMA

JUDGE

06/03/2020

Date: 06/03/2020

Coram: A.R. Mruma,J.

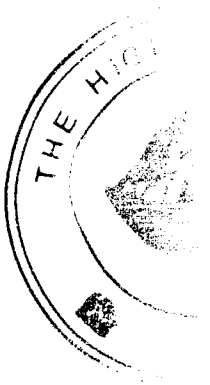
Applicant: Absent

Respondent: Mr. Kiariro for Dismass Raphael for the respondent who is present

Court Clerk: Nakijwa

Court:

Ruling delivered.



A.R. Mruma

Judge

Dated at TANGA this 6th Day of March, 2020