

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA SUB – REGISTRY**

**AT MUSOMA**

**MISC. LABOUR APPLICATION NO 12 OF 2021**

*(Arising from the Ruling and order of Execution No. 46 of 2015 in the High Court of Tanzania at Musoma Labour Court)*

**BENJAMINI MUGAGANI ..... APPLICANT**

***VERSUS***

**BUNDA DISTRICT DESIGNATED HOSPITAL ..... RESPONDENT**

**RULING**

15<sup>th</sup> September and 10<sup>th</sup> November, 2021

**F.H. MAHIMBALI, J.:**

This ruling is in respect of the preliminary objection raised by the respondent in this application following an application by the applicant to review the decision of this court (P.R. Kahyoza – Deputy Registrar) dated 8<sup>th</sup> November, 2017. The application is supported by the affidavit of the applicant.

Prior to the date set for hearing of the application, the respondent raised four objections, namely:

1. That this honourable court has no jurisdiction to try this matter.
2. That the application is bad in law for lack of Notice of Representation.

3. The application is bad in law for non – description of the parties in the affidavit.
4. That the application is frivolous and vexatious.

During the hearing of the said Preliminary Objections, the respondent was represented by Mr. Ernest Mhagama whereas the applicant enjoyed the legal services of Mr. Emmanuel Gervas, both learned advocates.

However, during the hearing of the Preliminary Objection, the respondent's counsel abandoned the last two objections (the third and fourth objections), thus prayed to proceed against the first and second preliminary objections only.

With the first preliminary objection, it has been submitted that for one to execute, there, must be a decree. Reading the affidavit of the applicant at paragraph 11, it is clear that the applicant was reinstated after the first termination. However, upon his reinstatement, he was again terminated after four working days. This means that as there was reinstatement as per court/commission's order, then the decree was satisfied in the first place. The subsequent dismissal is another legal course and not the former course-continuing. Therefore, there is nothing of execution after the reinstatement had been done. In essence, there is

nothing executable by this court now. With this, it has been submitted that, the application for extension of time is out of place.

With the second Preliminary Objection, it has been submitted that the current application lacks notice of representation. Considering the legal requirements under section 56 (c) of the LIA, Act no. 7 /2004 read together with Rule 43 of LCR GN 106/2007, the law as it is, demands that in any application, there must be notice of representation. The requirement is mandatory. This is because, it is through this notice the Court is let to know the names and particulars of the representing officer of the Applicant. As the wording of the provision is shall, then compliance to it is not an option but a must. According to section 53 (2) of the interpretation of laws Act, Cap 1 where the word "shall" is used, then requirement or compliance to it is mandatory. This means, as in this application the applicant is dully represented, the requirement of notice of representation was mandatory (see **Hamza Omary Abeid vs Pro Mining Services** – Labour Revision No. 54 of 2019 High Court Mwanza Labour Registry) at page 6.

With this, it has been prayed that this application be struck out with costs (Rule 51 (2) of LCR of 2007) as the application is vexatious and frivolous.

Countering the preliminary objection, Mr. Emmanuel Gervas learned advocate for the applicant submitted that with the first point of objection, it has not qualified in the eyes of the law to be a preliminary objection. An objection to be preliminary it must be purely on a point of law (see **Mukisa Biscuit's case**), self proof, not evidence proof and that it must finalise the case. With this observation, the first preliminary objection is not on a legal basis. The fact that the applicant was reinstated is a fact of proof. There must be evidence to prove this fact. Since an application for review is a legal right, it is properly before the court (see Rule 26 (1) (2) of LCR GN 106 of 2007).

With the second point of preliminary objection that there is no notice of representation, the learned counsel referred this court to the first document of Notice of Application which has the following wording (after prayer no iii), AND TAKE NOTICE THAT, the applicant appoints Advocate Emmanuel Gervas, of P.O.Box 1061, MUSOMA, FROM ANGLICAN BUILDING as applicant's representative of this matter. With this wording, the learned counsel has submitted that the essence of notice of representative has been dully captured. To prove the genuineness of the notice of representation, all these correspondences have been dully made via the same office. As he is known so, he

wonders as to why now the respondent's counsel raises doubt with his representation.

With the cited High Court case of **Hamza Omary Abeid**, he argued that the same is not binding to this Court. He submitted further that this honourable court to take note that there is no prescribed format for filing notice of representation. As his address is there, he is sure that he has met the mandatory legal requirement as per law. Considering the nature of this case, he is persuaded to believe that there must be a different prevailing circumstance to the case of Hamza Omary (*supra*).

Considering this submission, he is praying that this purported objection on a point law be overruled with costs.

Re-joining, Mr. Mhagama learned counsel for the respondent while reiterating his submission in chief, submitted further that as per paragraph 11 of the applicant's affidavit, is clear that there has been proof of the fact. That as per law, executions in Labour matters are governed by the CPC, in the absence of Court's decree, there is nothing executable by law. This is purely a point of law. How can this Court entertain an application without decree?

With the second preliminary objection, the point of insistence is on notice of representation. Notice of application has never been an alternative to notice of representative. These are two different documents. The same are guided by two different provisions. No one can cure the other.

Upon hearing both learned advocates in respect of the preliminary objections raised for and against the preliminary objection of the application, I am satisfied that the second objection to the application has merit. First, there is a violation of the mandatory provision of the law which wants the same to be accompanied by a notice of representation. By saying so, I am not subscribing the argument that the notice of application cures the defect or serves the same purpose of notice of representation. Should that have been the intention of the law, the parliament wouldn't make it mandatory. These two documents are not similar and the same thing. Therefore, in any way the notice of application does not cure the absence of notice of representation. The former does not substitute the latter and vice versa. As the wording to its compliance is mandatory, section 53 of Interpretation of Laws Act, Cap 1 R.E 2002 provides that where the word "shall" is used in conferring any function, that function is mandatory. Nevertheless, in the circumstances of this case, considering the fact that the said details on

notice of representative are embodied into the notice of application, for the interest of justice I invoke the principle of overriding objective to allow the applicant amend his application and file the notice of representation as per law.

In a further perusal of the matter as per applicant's affidavit, there are two annexures of my interest, namely **Misc Labour Application no. 1 of 2020** and **Misc Labour Application no. 8 of 2020** by same parties in which my brother Kisanya, J struck out both applications. In the former cause, the same applicant attempted to file an execution application out of time. It was struck out for reason that this Court had already determined the execution proceedings in which he was seeking leave to file the execution application out of time. In the latter application (**Misc Labour Application no. 8 of 2020**), the same applicant via the same counsel lodged an application moving this Court to extend time to file notice of appeal against the ruling of Execution No. 46 of 2015 in the High Court of Tanzania at Musoma Labour Court. The same was struck out for two reasons: firstly, there was no notice of application (whereas this time there is no notice of representation). Secondly, the application was supported by an affidavit of Magige Giboma who was not the applicant to the that application. With these two errors, the application was struck out.



What I can gather from the numerous applications by the learned counsel, he is making a tossing or a gambling game to Court of law. Lack of seriousness in studying the matter before gearing an appropriate legal provision and appropriate court document is equal to an abuse of court process. Nevertheless, for the interests of justice, I am of the view that with the Overriding Objective principle, let it be invoked so that we may go to the merits of the application. In the circumstances, the pointed out legal omission or failure to file notice of representative as similar details are compounded into the notice of application, for the interests of justice and in fairness, I dismiss the second objection as well.

In totality, for the interests of justice the application is allowed to proceed for purposes of attaining justice of the case. The second objection though valid, should not defeat justice of the case. I thus overrule it for the interests of justice. No order as to costs.

It is so ordered.

DATED at MUSOMA this 10<sup>th</sup> day of November, 2021.



  
F. H. Mahimbali

JUDGE

10/11/2021



**Court:** Ruling delivered in this 10<sup>th</sup> day of November, 2021 in the presence in person for the applicant, Mr. Gidion – RMA and in the absence of the respondent.



F. H. Mahimbali

JUDGE

10/11/2021