

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA

LABOUR REVISION NO. 07 OF 2021

(Originating from Labour Dispute No. CMA/IR/51/2020)

OMBENI MWIDETE & ONE ANOTHER ----- APPLICANT

VERSUS

ONE ACRE FUND (TANZANIA) ----- RESPONDENT

Date: 09/11 & 14/12/2021

RULING

MATOGOLO, J.

This ruling emanates from the notice of preliminary objection raised and argued by the learned advocate for the Respondent One Acre Fund (Tanzania) One Papian Rwehumbiza. In that notice of preliminary objection (PO) Mr. Rwehumbiza raised five points of objection namely:-

- (i) That, the application is bad in law for not being in conformity with the Rules as to form and manner of lodging applications in courts, contrary to Rules 24(1) and (2) of the Labour Court Rules, GN No. 106 of 2007.
- (ii) That, the Applicant is frivolous and vexation by containing defective verification clause.

- (iii) That, the entire Application is incompetent and bad in law for being preferred under non existing law.
- (iv) That, the Application is bad in law since it offends Section 44(1)(2) of the Advocates Act [Cap. 341] R.E. 2019.
- (v) That, the affidavit is frivolous and vexatious since the affidavit contains prayers, legal arguments, new facts and case law.

The applicant was represented by Mr. Mugendi Francis Kohi learned advocate. The preliminary objection was argued by written submissions.

Mr. Papian Rwehumbiza supported the point of objection by his submission as follows:-

As to point No. 1 he said Rule 24(1) and (2), of the Labour Court Rules GN. No. 106 of 2007 provides for the form and manner for lodging an application for Revision in Labour Disputes it shall be supported by an affidavit which shall clearly set out

- (a) The names, description and address of the parties.
- (b) A statement of the material facts in chronological order, on which that application is based.
- (c) A statement of legal issues that arise from the material facts, and
- (d) Relief ought.

He said those particulars must be contained in the application and not in an affidavit alone. It is why the above mentioned items in subsection

3 do not mention the essential segments of the affidavit like jurat of attestation and verification clause. But the reliefs claimed are placed in chamber summons which form part of the application as provided under rule 4. He argued, the provision of one Section cannot be used to defeat another provision of the Section of a statute unless it is impossible to effect reconciliation between them. The same rule applies to subsection of Section. To that he cited the case of **TRADE UNION CONGRESS OF TANZANIA (TUCTA) VS. ENGINEERING SYSTEM CONSULTANTS LTD & OTHERS** Civil Appeal No. 51 of 2016 CAT, although there has been interpretation by courts on the issue of precedent as it was held in the case of **MVOMERO DISTRICT COUNCIL VS. THOBAS ADAM LIWONGE & 6 OTHERS**, Revision No. 25 of 2017 in which the presiding judge misdirected himself by interpreting sub rule 3 of rule 24 in isolation of other rules. However he said that decision is not binding upon this court but is a mere persuasive per the decision of Kyando, J. in **FREITA WALTER & OTHERS VS. REPUBLIC (1991) TLR 62**.

As to ground/point No. 2 the Respondent's advocate argued that the application is unmaintainable in law as it contains defective verification clause contrary to Rule 24(3). He argued that the verification clause in the applicant's affidavit is defective as the verifier did not state which facts are true to his own knowledge and what are true basing on the information supplied to him by his advocate which he believe to be true. He reproduced the verification clause to read as follows:-

"I OMBENI MWIDETE, states that all what is stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 is true to the best of my knowledge".

He also said the verification clause by the second applicant herein one Irene Mwinyikambi items (a),(b),(c) and (d) of paragraph 12 of the affidavit and paragraph 13 are not verified. Thus he prayed the same be expunged from the affidavit. He submitted that the verification clause not properly fixed renders the affidavit defective and the application become incompetent. He supported his argument by citing the case of **JUMA SAID YAHAYA ABDALLAH VS. REPUBLIC**, Criminal Application No. 4 of 2010 and the case of **ANATORY PETER RWEBANGIRA VS. THE PRINCIPAL SECRETARY MINISTRY OF DEFENCE AND NATIONAL SERVICE AND THE HON. ATTORNEY GENERAL**, Civil Application No, 545/04 of 2018 CAT (unreported).

As to point No. 3 it is the submission of the respondent that the application is misconceived as this court is not properly moved. He said the application has been made under Section 91(1)(a) and (b), 91(2)(b),(c) of the Employment and Labour Relations Act, No. 6 of 2004. He argued that such section is nonexistent. He said the proper citation should be Section 91((1)(a) and (b) 91(2)(b)(c) of the Employment and Labour Relations Act, (Cap. 366 R.E. 2019) as per the Law from Revision Act, Cap. 4 of 2020 subsection in the Government. Notice No. 140 published on 28th February 2020. For wrong citing enabling provision he cited the case of **CHINA**

HENAN INTERNATIONAL CO-ORPERATION GROUP VS. SALVAND K.A. RWE GASIRA (2006) TLR 220 and the case of ALMAS IDDIE MWINYI VS. NBC AND MRS NGEME MBITA (2001) TLR 53.

He stated further that wrong citation of the law, section, subsection and/or paragraphs of the non-citation of law will not prove the court to do what is asked and renders the application incompetent as it was held in the case of **EDWARD BACHWA & 3 OTHERS VS. THE ATTORNEY GENERAL & ANOTHER**, Civil Application No, 128 of 2006, CAT (unreported).

Regarding the point No. 4 the respondent argued that the application is bad in law as it offends section 44(1) and (2) of the Advocate Act (Cap. 341 R.E. 2019). His argument is that the drawer of the application documents is unknown as he did not endorse his name and address and that it was wrong for a registered authority to accept and recognize such document. He said the documents filed by the applicant by the applicant were neither endorsed nor signed to show as to who drawn them which renders the entire application to be useless before this court. He supported his argument by citing the case of **RUTH LANGENI MTANGA VS. ILEMELA MUNICIPAL COUNCIL**, Labour Revision No 66 of 2019 H/C (unreported).

In regard to point No. 5, he argued that the application is frivolous and vexatious since the affidavit contains prayers, legal arguments and new facts and case law, matter which are prohibited in the land mark case

of **UGANDA VS. COMMISSIONER OF PRISONS, EXPARTE MATOVU (1969) EA 514.**

He said if you look at the applicants affidavits particularly at paragraphs 7 and 12 (a)(b)(c) and (d) of both affidavits sworn by Ombeni Mwidete and Irene Mwinyikambi contain the above mention matter, he said the above mentioned paragraphs with prayers, legal arguments, new facts and case law are offensive paragraphs which are to be expunged from the affidavits. To that he cited the case of ***NMG GOLD LIMITED VS. HERTZ TANZANIA LIMITED***. Miscellaneous Commercial Cause No. 118 of 2015 H/Court (Commercial Division) (unreported) and the Case of **DAVID JOHN VS. UNILEVER TEA TANZANIA LTD**, Labour Revision No. 5 of 2019 H/Court (unreported). With that submission, the respondent prayed to this court to agree with him and invoke Section 51 of the Labour Court Rules for the applicants to be condemned for costs.

On their part the applicants through their advocate replied to point No. 1 and 5 collectively. He submitted that the objection and reasoning given is unfounded. He said reliefs are categorically part of an affidavit under section 24(3) (d) of the Labour Court Rules. That position was taken in the case of **DAUDI GODFREY MACHA VS. MEK ONE GENERALTRADERS**, Misc. Application No. 387 of 2019.

The applicants counsel said the case of **UGANDA VS. COMMISSIONER OF PRISONS**, (supra) quoted by the respondent's counsel is irrelevant to the case at hand as he did not appreciate the

peculiarity of the affidavit in Labour dispute. He said the same reason applied above is adopted to this argument with the addition that what the respondent views as being legal arguments are legal issues crafted by virtue of rule 24(3)(c). As to the second point of objection, the applicants reply as to the effect that the argument is twofold.

Firstly, that, reference to paragraph 12 includes the sub paragraph (a) to (d) for reason of their apparent non-inclusion in the verification clause. He said they take note of that but hold view that in the absence of subsection 12(1), 12(2) to paragraph 12 they inclined to the conclusion that reference to paragraph 12 is specific enough to entail its subsection. But he argued that this eventuality is not fatal but curable.

Secondly, the verification clause excluded mentioning matter of beliefs, on this limb he said he wished to borrow the experience of the CPA as amended, given the apparent silence of the Labour Court Rules. Order XIX r 3(1) in particular that affidavit shall be confirmed to such facts as the deponent is able of his own knowledge to prove, exception interlocutory applications on which statement of his belief may be admitted. He said it is becoming conspicuous that confinement to matters of knowledge in affidavit is not only mandatory , but that matter of belief are optional and confined to interlocutory orders. He said the applicants were point of the Arbitration proceedings from which this Revision arises and have personal knowledge of the court records that form part of Revision. This position was adopted in **HAMED RASHID HAMED VS. MWANASHERIA MKUU**

(1997) TLR 35. He argued that the affidavits in question met the statutory requirements laid by the law hence validly executed.

Regarding the point No. 3, applicants counsel replied that, what the respondent attempt to make distinction between Act No. 6 of 2004 and Cap 366 R.E. 2019 is bizzarre because it is a distinction without a difference. But it is the same law passed in 2004, revised in 2019 which could as well be referred to Act No. 6 of 2004 as amended from time to time and the effect would be the same so long as the reference of the provisions have not change as it remains Act No. 6 of 2004. Respondent did not said how the using citation V. Cap/RE changes the legal effect of the cited provision. He said the cited case of ***EDWARD BACHWA (2006)*** to be inapplicable as the same was on a compete failure to appreciate the applicable Legislation.

As to point No. 4 objection for violation of Section 44(1)(2) of the Advocate Act, (Cap. 341 R.E. 2019, the learned counsel for the appellant submitted that the Respondent is put to strict proof for failure to point out specifically how the application is not endorsed. In conclusion, the appellant's counsel submitted that the respondent has prayed for dismissal of the application which happen in extreme circumstances but usually if there are shortcomings are alleged the remedy is for the application to be struck out as it was done in the case respondent has cited.

He further submitted in reference to the principle of overriding objective that requires courts to deal with cases justly and have regard to

substantive justice by avoiding reliance to procedural technicalities in the administration of justice. He insisted this court to consider whether the omission or irregularity occasioned injustice to other party per the decision in the case of **CHARLES BODE VS. THE REPUBLIC (2019) TZCA 70**. But he also argued that even if there has been defects in the same are curable and not fatal as it was held in the case of **GASPAR PETER VS. MTWARA URBAN WATER SUPPLY (2019) TZCA 25** that up holding preliminary objection would be punishment to client for mistake done by its counsel as the defect did not affect the jurisdiction of the court. He said what is required is amendment to remove or deleting the wrong provision as it was held in **ALLIANCE ONE TOBACCO AND ANOTHER VS. MWAJUMA HAMIS AND ANOTHER (2020) TZCHC 3665**. The appellants counsel made a distinction between dismissal and striking out of the case by citing various cases such **NGONI- MATENGO CO-OPERATIVE MARKETING UNION LTD VS. ALI MOHAMED OSMAN (1954) EA 577** and **EMMANUEL LUOGA VS. REPUBLIC**, Criminal Appeal No. 281 of 2018. He argued that adjoin what is not competently before it as it was held in the case of **AMAN MATEWO VS. DIOCESE OF MEYA (RC)**, Civil Appeal No. 22 of 2013 (unreported).

The applicant's counsel prayed for the preliminary objection to be overruled.

In rejoinder respondent namely reinstated what he submitted in his submission in chief.

Having read the rival submissions by the parties, the cited provisions and case laws cited, the issued for determination is whether the preliminary objection raised is maintainable in law. Starting with point of objection No. 5 the argument is that the application is bad in law for not being in conformity with Rules as to form and manner of lodging application in court thus violated Rule 24(1) and (2) of the Rules. The rule spelt out what is to be contained in the supporting affidavit as listed herein in this ruling above. I have visited the affidavits in support of the application, I am unable to see the names, description and address of parties as directed in rule 24(1) and (2) of the Labour Court Rules. It is a mandatory legal requirement for the applicants to show that in their affidavits as the word "shall" used import mandatory compliance in terms of Section 53 (1) of the interpretation of the laws Act, Cap. 1 R.E. 2019. Item 1 is neither indicated in the chamber summons, notice of application nor supporting affidavit. The second item requires a statement of the material facts in chronological order in which the application is based. Let us assume that the applicants gave such statement in the paragraphs of the affidavits without specifically indicating. But still item 3 was not complied with as there is nowhere applicant drawn a statement of legal issues that arise from the material facts. This equally is a mandatory legal requirement. The fourth and last item is relief sought. Reliefs like prayers are put in the chamber summons which upon perusing the chamber summons, the same are indicated. However as pointed out, items No. 1 and 3 were not indicated. But it is trite that the requirements under Rule

24(1) and (2) of the Rules must be complied with cumulatively not only some of them.

The learned counsel for the applicants appears to have skipped to address the court the said items in compliance to the above cited ruled. I therefore find this point of objection with merit the same is sustained.

Going to the second point objection that, the affidavit contains defective verification clause.

The impugned verification clause states:-

"VERIFICATION The impugned verification clause states:-

I, OMBENI MWIDETE state that all what is stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 is true to the best of my knowledge".

That of Irene Mwinyikambi read as follows:

"I IRENE MWINYIKAMBI state that all what is stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 is true to the best of my knowledge".

The respondent's counsel has argued that in the verification clause of the affidavit of Ombeni Mwidete items (a), (b), (c) and (d) of paragraph 12 of the affidavit are not verified, likewise for the verification clause of the

affidavit of Irene Mwinyikambi the whole paragraph 12 as well as paragraph 13.

Having gone through the affidavits by the applicants, in the impugned paragraphs, the deponents verified paragraph 12 generally without indicating the subparagraphs which show that the subparagraphs of paragraph 12 in both affidavits were not verified likewise for paragraph 13 of the affidavit by Irene Mwinyikambi. It is trite law, as it was correctly submitted by the counsel for the respondent that once the verification clause is not properly fixed in a legal document it renders the affidavit defective and the application incompetent. That was clearly held in the case of **ANATOL PETER RWEBANGIRA VS. THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE AND ANOTHER** (supra).

The applicant's learned counsel did not adequately respond to this apart from admitting the omission but agreed that the same is not fatal.

Looking at the above cited case it is obvious that the same is fatal that is why the application was struck out after being found to be incompetent before the court. This apply to the case at hand.

As regards to point No. 3 for wrong citation, Respondent's counsel argued that in their application/chamber summons applicants cited provision under the Employment and Labour Relations Act No. 6 of 2004 instead of Cap. 366 R.E. 2019. The learned counsel for the Respondent argued that the applicants have cited non existing law. I think this

argument has no legal force as he failed to demonstrate how the manner the Act was cited make it non-existent, it was correctly submitted by the applicant's counsel in his reply submission that the law can be cited in any form. It can be by merely mentioning the Act name, Act number or cite it completely by its name, number and Revised Edition. But by only citing Act number, it cannot be said the applicants cited no existing law. After all this requires evidence to prove the same thus cease to be a point of law. I therefore find no merit in this point the same is overruled.

Regarding point No. 4 that, the application is bad in law as it offends section 44(1) and (2) of the Advocates Act. The argument here is that the drawer of the document filed did not endorse them as required by section 44(1) and (2) of the Advocate Act. He argued that as the said documents were drawn by a lawyer, and advocates such omission cannot be excused, it is unlike if drawn by a lay person. Applicant's counsel did not respond to that rather than by saying the respondent is put to strict proof for failure to point out specifically how the application is not endorsed. I have gone through the complained of documents, that is Notice of Application, chamber summons, affidavits and Notice of representation. The documents show the name of the drawer to be Mugendi Francis Kohi lead partner TAXI PRIME ATTORNEYS CRDB House Tegeta Darajani P. O. Box 60348 Dar es Salaam. It is indicated drawn and filed. But the same was not endorsed. Section 44 (1) and (2) provides:-

"(1) Every person who draws or prepare any instrument in contravention of Section 43

shall endorse or cause to be endorsed thereon his name and addresses, and only such person omitting so to do or falsely endorsing or causing to be endorsed any of the said requirements, shall be liable on conviction to a time not exceeding two hundred shillings.

(2) It shall not be lawful for any registered authority to accept or recognize any instrument unless it purports to bear the name of the person who prepared it endorsed therein'

Although the drawer's name is indicated, but the same is not endorsed and that is in violation of Section 44(1) and (2) of the Advocates Act. I also find substance in this point of objection. The last point of objection is that the affidavit is frivolous and vexatious, the same contain prayers, legal arguments, new fact and case law. The respondent's counsel pointed out paragraphs 7 and 12 (a) (b)(c) and (d) of both affidavits to contain prayers, legal arguments, new facts and case law. It is unfortunately that the applicant's counsel in his reply submission did not respond to this which impliedly he conceded to the objection. Instead he tried to distinguish between the two reliefs, dismissed and striking out. I have read through the impugned paragraphs, paragraph 7 contains legal argument and cited case law. Paragraph 12 contains prayers. It was held in


various cases that an affidavit should not contain prayer, legal argument, extraneous matter by way of objection or conclusion. In the land mark case of **UGANDA VS. COMMISSIONER OF PRISONS, EXPARTE MATOVU** (supra) it was held:-

"The affidavit sworn by counsel is also defective. It is clear bad in law as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence should only contain statement of facts and circumstance to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal argument or conclusion"

As the pointed out paragraphs contain prayers, legal argument and extraneous matters the same are offensive paragraphs which are to be expunged from the affidavit per the decision of the Court of Appeal in the case of **MSASANI PENINSULA AND OTHERS VS. BARCLAYS BANK AND OTHERS [2007] CAT.**

By expunging from the affidavits those offending paragraphs and taking into account that points of objection No. 1, 2 and 4 have been sustained. They render the whole application incompetent which cannot be acted upon by this court. It follows therefore that as the application is incompetent before this court the same is struck out. But no order as to costs this being a Labour dispute.




F. N. MATOGOLO
JUDGE
14/12/2021

Date: 14/12/2021
Coram: Hon. F. N. Matogolo – Judge
Applicant: Present
Respondent: Absent
C/C: Grace

Mr. Raymond Byombalirwa – Advocate:

My Lord I am holding brief for Mr. Papien Rwehumbiza advocate for the respondent the matter is for ruling on our part we are ready.


Applicant:

Honourable Judge we are also ready.

COURT:

Ruling delivered.




F. N. MATOGOLO
JUDGE
14/12/2021