

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

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**REVISION NO. 55 OF 2019**

**(Originating from CMA/ARS/ARB/164/2017)**

**ONESMO JOSEPH NANYARO..... APPLICANT**

**VERSUS**

**KIBO PALACE HOTEL..... RESPONDENT**

**RULING**

26/5/2021 & 18/8/2021

**ROBERT, J:-**

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as the CMA] the applicant, filed this application challenging the CMA award in the Labour Dispute No. CMA/ARS/ARB/164/2017 decided in favour of the respondent. The applicant calls upon this court to revise and set aside the whole CMA award, on the ground set forth in the attached affidavit and determine the same in the manner it considers appropriate. The application is

supported by the sworn affidavit of one **Samwel Gard Madulanga**, counsel for the applicant and resisted through a counter affidavit sworn by **Peter Kuyoga Nyamwero**, counsel for the respondent.

Briefly stated, the applicant was employed by the respondent as a driver since 1<sup>st</sup> August, 2010. On 13<sup>th</sup> day of December, 2011, while on duty, he took the accountant to a bureau de change and on the way back to the hotel they were blocked by armed robbers who pointed guns at him and ordered him to drive to a place called Lemara where they took all their belongings including the companies' monies. Thereafter, he was charged, convicted and sentenced to serve 30 years in prison. Aggrieved, he appealed successfully to the Court of Appeal of Tanzania (CAT) where the CAT ordered a trial de novo. On 22<sup>nd</sup> day of November, 2016 he was released after being found not guilty. He went back to his work place and demanded to be reinstated but he was not accepted. Aggrieved, he referred the matter to CMA where it was held that the respondent had a valid reason terminating his employment and ordered the applicant to be awarded annual leave and notice only.

Prior to the hearing of the application, the respondent's counsel raised points of preliminary objection against the application to the effect that:-

- i. That the applicant's notice of application is bad in law for offending the provision of section 24 (2) (d), (e) and (f) of the labour Court Rules, 2007 (GN No. 106 of 2007).*
- ii. That, the Affidavit in support of the Applicant's Application for revision is incurably defective for containing a defective verification clause.*

As a matter of practice, the Court ordered parties to address the Court on the objections raised before proceeding with the main application in case the objections are overruled. The applicant enjoyed the services of **Samwel Gard Madulanga**, learned counsel while the respondent was represented by **Peter Kuyoga Nyamwero**, learned counsel. Hearing proceeded by way of written submissions at the request of parties.

Submitting in respect of the first point of preliminary objection, counsel for the respondent submitted that, the application did not comply with form No. 4 set out in the schedule to the Labour Court Rules, G.N. No. 106 of 2007 and also violated rule 24 (2), (d), (e) and (f) of G.N. 106/2007. He maintained that Rule 24 is couched in mandatory terms by the use of the word "shall". He made reference to the case of **Hamza Omary Abeid vs Promo Mining Services**, Labour Revision No. 54 of 2019 (unreported). Based on the stated reason, he prayed for the application to be struck out for failure to comply with the mandatory requirement of the law.

With regard to the second point of objection, Mr. Nyamwero submitted that, the affidavit supporting the application contained defective verification clause. He maintained that, the deponent is required to disclose the source of information deposed in an affidavit as provided for under Order XIX Rule 3 (1) of the **Civil procedure Code**, Cap. 33 (R.E 2019). He noted that, in the present application the verification clause reads as follows:-

*"I, SAMWEL GARD MADULANGA, the applicant's Advocate dully authorized do hereby verify that the contents of paragraph 1,2,3,4,5,6,7,8,9,19,11,12,13,14,15,16,17,18,19,20 and 21 are true to the best of my knowledge and information given to me by the Applicant herein which I verily believe to be true".*

He argued that, from the quoted verification clause it is difficult to distinguish the information verified upon the knowledge of the deponent and from the information given to the deponent from the applicant. Thus, he maintained that the affidavit is incurably defective for containing general verification clause and prayed for the application to be struck out.

He reminded the Court that, this is not the first time the applicant is filling incompetent applications. He once filed Revision No. 59 of 2018 which suffered the same effect, he conceded to the preliminary objection and sought leave of the court to refile the application which was granted.

He therefore prayed that this application should be struck out without leave to refile.

Responding in respect of the 1<sup>st</sup> ground, Mr. Madulanga stated that, there is no violation of Rule 24 (2) (d), (e), (f) and 24(4) (a) of the G.N. No. 106 of 2007. He argued that, the notice of application filed in this court is almost the same as form No. 4 in the schedules of the Labour Court Rules, 2007 hence rule 24 (2) of the rules is not violated. He referred the Court to the case of **Dr. Abrama Israel Shumo vs National Institute for Medical Research and Another**, Civil Appeal No. 52 of 2017(unreported).

He submitted further that, rule 24 (2) (d) require that, there must be an address for service in the proceeding. This application was brought by Mr. Madulanga and his address appears at the bottom of the application. Rule 24 (2) (e) require a party who filed application to give a notice of advice to the other party who wish to oppose an application to file counter affidavit within 15 days after the service of the application, failure of which the matter may proceed ex-parte. This requirement cannot be found under Form No. 4 of the schedules. And as long as there is a specific provision (Rule 24 (4) (e) which require an affidavit to be filed

within 15 days from the day of service of the application it is not fatal when the applicant did not give notice to the other party.

In respect of the 2<sup>nd</sup> objection, Mr. Samwel informed the court that, if this was not a labour case, he could have conceded to the point of objection. However, the principles governing the affidavit does not apply to labour cases. He gave an example of Rule 24 (3) (c), (d) of the Rules which requires affidavit to contain legal issues and relief which is different from normal affidavit. Therefore, he maintained that, Order XIX rule 3 (1) of the Civil procedure Code, Cap 33 (R.E 2002) is not applicable in labour cases.

He added that, the applicant did not offend the Oaths and Statutory Declarations Act, Cap 34 (R.E. 2002) and maintained that, Labour Court being the court of equity should not be bound by mere civil academic that hinders justice that's why even personal representative is allowed to enter appearance. He quoted rule 55 (2) of the Rules which reads:-

*“(2) In the exercise and performance of its powers and functions, or in any academic matter, the court may act in a manner that it considers expedient in the circumstances to achieve the object of the Act and of the good ends of justice.*

On the basis of the stated reasons, he prayed for the raised objections to be overruled and the matter be scheduled for hearing on merit as justice require.

In a brief rejoinder, the respondent's counsel maintained that Civil Procedure Code do apply in labour cases. He referred the court to the case of **Angelile Elias Mkubwa vs CocaCola Kwanza Limited**, Misc. Application No. 06 of 2019 (unreported). He added that, the court cannot turn a blind eye on mandatory requirement of the law, if the law is offended the court is offended too. That being said, he maintained his arguments in respects of the raised objections and ordered the application to be struck out without a leave to refile due to a repeated errors done by the applicant herein.

Having carefully examined and evaluated the parties' arguments in light of the raised objections, I will now proceed to determine whether the objections raised have merit or not.

On the first point, the question for determination is whether the applicant's application contravened Rule 24 (2) (d) and (f) of the Labour Court Rules by not conforming to the prescribed form No. 4 to the schedule of the Rules.

Rule 24 (2) (d) (e) and (f) reads as follows:-

*"(d) an address at which that party will accept notices and services 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-parte; and*

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

Having revisited the notice of application filed by the applicant herein, it obvious, as submitted by the respondent herein, that it is not exactly as in the prescribed form No. 4 of the schedules to the Rules. However, it contained all the essential features of Form No. 4 set out in the schedules to the Rules.

The Court is aware that, Rule 24(2)(e) requires that there must be a notice to address the other party if he intends to oppose the application, which is not provided for. However, since the law under Rule 24 (4) (a) requires an opposite party to file counter affidavit within 15 days from the day they were served with application, failure of the applicant to write notice of advice cannot make the application incompetent. That said, I find the first point of objection with no merit and it is hereby overruled.

On the second point of objection, the respondent's counsel submitted that, the affidavit accompanying application contain defective



verification clause because the verification clause did not distinguish the information obtained from the deponent's own knowledge from information obtained from the applicant.

He also cited the case of **Anatol Peter Rwebangira vs The Principal Secretary, Ministry of Defence and National Service and The Attorney General**, Civil Application No. 548/04 of 2018, (Unreported) where CAT held that;


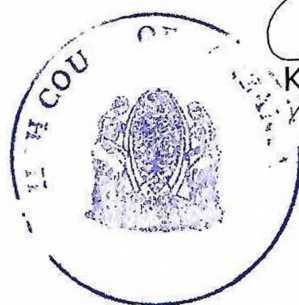
*"It is thus settled law that, if the facts contained in the affidavits are based on knowledge, then it can be safely verified as such. However, the law does not allow a blanket or rather a general Verification that the facts contained in the entire affidavit are based on what is true according to knowledge, belief and information without specifying the respective paragraphs."*

The above cited authority makes it clear that, a verification clause needs to specify which information is based on knowledge and belief and the ones obtained by other means by specifying that in the respective paragraphs. The verification clause in this application was a blanket one, counsel for the applicant did not specify in terms of paragraphs which information he received from the applicant and which ones he knew due to his own belief.

Though, in his submission the respondent's counsel told the court that, this being a labour matter the court needs not to belabour strictly on the requirements of the affidavits. I am aware that some of the general principles of affidavit does apply in labour cases under Labour Court Rules, 2007. I am also aware that the court needs to act in a manner that it considers expedient in the circumstance to achieve the object of the Act and of the good ends of justice. However, that expedient and good ends of justice needs to conform to the requirements of the law. That said, this point of objection is hereby sustained.

As a consequence, I find this application to be incompetent having been supported with an affidavit which has a defective verification clause and I hereby strike it out.

It is so ordered.

  
  
K.N. ROBERT  
JUDGE  
18/8/2021