

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. LABOUR APPLICATION NO. 22 OF 2020

(Arising from Application for Execution No. 82 of 2016)

ALPHONCE BELAS KAYES.....1ST APPLICANT

BALTHAZAR JEREMIAH MNG'ONG'O2ND APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK LTD (PLC)RESPONDENT

RULING

19/5/2021 & 25/8/2021

ROBERT, J:-

The applicants are seeking an order of re-enrolment of the Application for Execution No. 82/2016 which was dismissed on 17th day of September, 2019 before Hon. Nkwabi, DR for nonappearance of both parties. The application was brought under rules 24 (1), (2) (a), (b), (c), (d), (e) and (f) and Rule 36 (1), (2), (3) of the Labour Court Rules, GN 106 of 2007 (herein the Rules). It was accompanied by the affidavit sworn by **Mr. Peter Kuyoga Nyamwero**, counsel for the applicants.

Briefly, facts of this matter reveals that, the applicants herein filed a case at the Commission for Mediation and Arbitration (CMA) in Arusha vide Arbitration No. 72 of 2014 which was decided in their favour. The respondent was ordered to pay compensation of 12 months wages to each applicant as well as terminal benefits. Aggrieved, the respondents preferred a revision before this court and the Court sustained the decision of the CMA. As a consequence, the applicants proceeded to file an application for execution to enforce the said decree of the court.

Unfortunately, on 17th day of September, 2019 when the matter was scheduled for hearing both parties did not enter appearance and the deputy registrar decided to dismiss the application for nonappearance of the parties. Following the said dismissal, the applicants are now seeking an order of the court to set aside the dismissal order and re-enrol the said application for execution.

However, prior to the hearing of the preliminary objection, the respondent raised four points of preliminary objection to the effect that:-

- (1) That the notice of application and notice of representation has been signed by the applicants.*
- (2) Affidavit in support of the application is defective for noncompliance with labour Court Rules 2007 G.N 106 of 2007.*
- (3) The application is time barred.*

(4) That the deponent in supporting affidavit does not disclose the source of his information.

At the hearing of the preliminary objections, **Mr. Peter Kuyoga Nyamwero**, learned counsel, represented the applicants whilst **Mr. Paschal Kamala**, learned counsel appeared on behalf of the respondents. At the request of parties, the Court ordered the hearing to proceed by way of written submissions.

Starting with the first point of objection, counsel for the Respondent submitted that, the order which the Court is moved to set aside was delivered on 17th September 2019 for nonappearance of both parties. Under Rule 38 (1)(a), (b) and (c) of the Labour Court Rules, the Court is empowered to set aside any order upon good cause. The Rules requires the Applicant to lodge such an application within fifteen (15) days from the date of acquiring knowledge on the existence of the order as provided under Rule 38 (2) of the Labour Court Rules. He maintained that, the Applicant wrongly cited Rule 36 (1), (2) and (3) of the Labour Court Rules. To back up his stance he cited the case of **the DED Sengerema District Council vs Peter Msungu and 13 others** (2014) LCCD 1.

He argued further that, even if the cited provision of law was applicable, the Application would still be out of time. The Application was dismissed on 17th September 2019 hence, it was filed after expiry of six

month. There is no any explanation as to why it was not filed immediately after it was dismissed. The labour law was enacted for expeditious dispute resolution as the longest period in the Labour Statutes is sixty days. To support his stance Counsel for the Respondent cited the case of **Dr. Noordin Jella vs Mzumbe University**, Complaint Number 47 of 2008. He added that, Part III item 21 of the schedule to the Law of Limitation Act, Cap 89 (R.E. 2002) prescribes a period of sixty (60) days where the time to file an application has not been provided by statute.

With regard to second preliminary objection, Counsel for Respondent submitted that the notice of application is defective for not being signed by the Applicants. He maintained that, the notice was signed by the applicants' representative which contravenes Rule 24 (2) of the Labour Court Rules. To back up his stance, Counsel for Respondent cited the case of **Samwel Japhat vs Geita Gold Mining Limited** (Labour Revision No. 82 of 2019, High Court of Tanzania at Mwanza) (unreported).

With regard to the third point of objection, he submitted that, the affidavit in support of the application is defective for non-compliance with Rule 24 (3) (a), (b), (c) and (d) which requires affidavit to contain name, address of the parties, and statement of legal issues that arise from the material facts. In support of his stance, he cited the case of **Issa**

Mangara and Another vs Tanzania Railways Limited (2014) LCCD 28 and **Lucy Kessy vs National Microfinance Bank PLC** Misc. Application No. 133 of 2019 (High Court – Labour Division at Dar es Salaam) (unreported).

On the basis of submissions made, he implore the Court to find that the application is unmaintainable and should be dismissed for being time barred.

In reply, Counsel for the Applicant submitted that, a preliminary objection must be on a pure point of law and facts which has been ascertained and not on judicial discretion. To support his position, he cited the case of **Mukisa Biscuits Manufacturing Company Limited vs Westend Distributors Limited** [1969] E.A 696. He argued further that, as this is an application to re-enrol a previously dismissed application and Rule 36(1) of the Labour Court Rules gives the Court a discretionary power to reenrol the application then, a preliminary objection cannot be raised against judicial discretion. To support his argument, he cited the case of **Attorney General vs the Board of Trustee of the Cashewnut Industry Development Trust Fund and Hammers Incorporation Company Limited**, Civil Application No. 72 of 2015 CAT – Dar es Salaam (unreported). Hence, he maintained that, the preliminary objection raised

by the Respondent does not meet the requirements of a preliminary objection.

Responding to the first point of preliminary objection, he submitted that Counsel for the Respondent is misdirected about the provisions of rule 38 of the Labour Court Rules. He argued that, the cited rule is applicable for applications to set aside court order or/and default Judgment and not applicable in the present application. He clarified that the present application seek to reenrol an application which was struck out due to non-appearance and the applicable provision is rule 36 of the Labour Court Rules. He distinguished the circumstances in the case of **the DED Sengerema District Counsel** (supra) from this case since the said case dealt with an application to set aside an ex-parte order and default Judgment and not reenrolment of a matter which was struck off for nonappearance.

He submitted further that, in this application time starts to run when the person affected by an order becomes aware and not when an order was delivered. He distinguished circumstances in the case of **Dr. Noordin Jella vs Mzumbe University** Complaint No. 47 of 2008 (Unreported) from this case and noted that the said case dealt specifically with filing of

a dispute after failure of mediation in the Commission for mediation and Arbitration.

He argued the second and third points of preliminary objection jointly. The two points deals with competence of the notice of application, affidavit and notice of representation. He submitted that, counsel for the respondent submitted on the notice of application and affidavit but chose to stay mute on notice of representation. He argued that, the Notice of Representation is guided by Rule 43 (1) of the Labour Court Rules which requires representatives to provide information to the Registrar. Therefore, it is proper for the Notice of Representation to be signed by the Applicants representative and there is no fault in doing that.

He argued further that, submissions by the counsel for the respondent are based on misconception of the nature of this application. He reminded the Court that this application was filed under rule 36(1) of the Labour Court Rules, G.N. No. 106 of 2007 which requires the Applicant to file Affidavit only, hence other documents cannot be considered for this application to be competent. Rule 36 (1) of the Labour Court Rules reads:-

"Where a matter is struck off the file due to absence of a party provides the Court with a satisfactory explanation by an affidavit for his failure to attend the Court."

He submitted that rule 24 of the Labour Court Rules does not apply in the circumstances of this case until the Court makes an order to comply with that rule. He distinguished the circumstance in this case and one in the case of **Samwel Japhat vs Geita Gold Mining Ltd**, Labour Revision No. 82 of 2019 as that is an application for revision and not application to reenrol a file which was dismissed for nonappearance. He implored the Court to overrule the preliminary objection since the application is in compliance with the law.

In a rejoinder, counsel for the respondent stated that the points of preliminary objection raised complies with the threshold for preliminary objections as set in the case of Mukisa Biscuits. He submitted that all points of objection have been supported by legal authorities indicating the position of law in relation to the noted defects.

He maintained that, the argument raised by the learned counsel that a preliminary objection cannot be raised against a judicial discretion is unfounded and unknown practice of the Labour Court of Tanzania since Execution No. 82/2016 was not struck out but was dismissed by the Court for non-appearance of both parties hence rule 36 of the Labour Court Rules does not apply.

He maintained that, since the applicant's case was dismissed, the dismissal order can be set aside under rule 38 (1) and (2) of the Labour Court Rules. To cement his position, he cited the case of **Joseph Zacharia Mazengo vs Kenya Kazi Security (T) Ltd** (2015) LCCD.

He submitted further that, it is an accepted legal principle that discretion of the must be exercised judiciously hence the Respondent has the right to file preliminary objection when the Applicant filed the application out of time.

Having considered submissions from the parties in respect of the raised preliminary objections, I will now make a determination on the merit of the raised points.

Starting with the point that the applicant has cited inapplicable law, that is Rule 36 (1), (2) and (3) of the rules instead of rule 38 (2) of the same rules and therefore the court was not properly moved. Records indicate that, the applicants brought this application under rule 24(1), 24(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d) and 36(1)(2)(3) of the Labour Court Rules. They also cited rule 36(1)(2) and (3) of the Labour Court Rules which provides for re-enrolment of the case which was struck out for non-appearance of the applicant.

The application before this Court is for re-enrolment of the application for Execution No. 82 of 2016 which was dismissed for non appearance of both parties. As rightly argued by the learned counsel for the respondent, Rule 36 cited by the applicants to enable this Court with jurisdiction to hear and determine this application provides only for re-enrolment of cases which have been struck out for non-appearance of the applicant. Rule 36(1), (2) and (3) of the rules do not move this Court to entertain the matter which has been dismissed.


Rule 55(1) of the Labour Court Rules, 2007 provides for the adoption of any procedure that the Court deems appropriate where a situation arises in proceedings or contemplated proceedings which the rules do not provide. Therefore, in absence of rules providing for a procedure or a situation which has arisen the applicants were supposed to move this Court for restoration of the application dismissed for non-appearance of the applicant by applying the procedures provided by other Laws.

That said, I find that this Court was not properly moved. Consequently, I hereby strike out this application. For interest of justice, the applicants are given 14 days from the date of delivery of the copy of this Ruling to file a proper application. As this point disposes this matter,

I find no pressing need to make a determination on the remaining points of objection.

It is so ordered.




K.N. ROBERT
JUDGE
25/8/2021