

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 62 OF 2021

**(Originating from the Award of the Commission for Mediation
and Arbitration at Arusha in Dispute**

No. CMA/ARS/KRT/139 & 167/2020)

JACKSON MUNGURE & 18 OTHERS

AND PAULO SILVIN SALAHO & 9 OTHERS.....APPLICANTS

VERSUS

TANGANYIKA WILDERNESS CAMPS LTD RESPONDENT

RULING

31/03/2022 & 23/06/2022

KAMUZORA, J.

The Applicants being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) preferred this revision under sections 91(1)(a) and (b), section 91(2)(b), section 94(1)(b) (i) of the Employment and Labour Relations Act No. 6/2004, Rule 24(1), (2) (a) (b) (c) (d) (e) (f) and (3) (a) (b) (c)(d) and Rule 28(1) (a) (b)(c) (d) & (e) of the Labour Court Rules G.N No. 106/2007. The Applicant prays for this Court to be pleased to call for the records, examine and revise the

proceedings and set aside the award in CMA/ARS/KRT/ARB/139 & 167/2020 dated 18th June, 2021.

The Applicant's application was supported by an affidavit deposed by Paulo Silvin Salaho the representative of all other Applicants. The application was strongly opposed by the Respondent who filed a counter affidavit proceeded by a notice of preliminary objection on points of law which states that: -

- 1. That the application is defective and incompetent for not being supported by a valid and appropriate affidavit.*
- 2. That the Applicant does not disclose the names of all Applicants.*

Prior to the commencement of the hearing the Respondent filed a notice of additional preliminary points of objection which read: -

- 1. That, the application is bad in law for it contravenes Rule 44(2) of the labour Court Rules, G.N No. 106,2007.*
- 2. That, the application is incompetent for failure to file mandatory notice of intention to seek revision (CMA F10) contrary to Regulation 34 of the Employment and labour Relations (General) Regulation GN No. 47 of 2017.*
- 3. That, the affidavit in support of this application is incurably defective for contravening the provision of Rule 29(3) of the Labour Institutions (Mediation and Arbitration) Rules 2007 which reads together with Rule 24(2) of the Labour Court Rules, G.N No. 106, 2007.*

With the leave of this court, hearing of the preliminary objections was conducted by way of written submissions. As a matter of legal representation, the Applicants enjoyed the service of Ms. Elizabeth Alais, Avit Anicet of ALAKIRA & CO. Advocates and the Respondent on the other hand enjoyed the service of Mr. Pedro Munis and Ms. Mwanili H. Mahimbali of AMAL Advocate.

In their written submission in support of preliminary points of objection, the counsel for the Respondent abandoned the first two points of objection and argued only three points under a notice of additional preliminary objection. I will not therefore bother myself to deliberate on the same.

Arguing in support of the 1st point of preliminary objection from the notice of additional preliminary objection the Respondents' advocates submitted that, it is a clear principle of law that when numerous persons are having the same interest in a suit, to appear for and on behalf of others in a representative capacity, one must apply and secure a leave of the court to that effect. That, the present application under paragraph 1 presupposes that the affiant one Paulo Silvin Salaho represents 28 other Applicants. That, the assumption is that, the purported representative must have complied with the mandatory provision of rule 44(2) of the Labour Court Rules which is a conditional

provision for there to be a representative suit. In support of his submission, he cited the case of **Christopher Gasper and Richard Rukizangabo and 437 others v Tanzania Port Authority**, Misc. Application No 281/2013 (unreported) which states that leave is essential for an employee who wants to appear in a representative suit.

The counsel submitted further that, before the CMA two disputes were only consolidated and there was no application for the representative suit. He was of the view that the consolidation of the suit does not automatically confer leave to any of the Applicants in the present Application to initiate representative suit in absence of formal application. To support this issue, they cited the case of **Samson Jeremia Magoti and Others v Bank of Tanzania**, Misc. Application No 259/2020(2021) (Unreported) which held that, a person can only act as a representative and initiate proceedings on behalf of others after he has obtained leave of the court where there are numerous persons with the same interest in the suit. That, rationale behind seeking and obtaining leave of the court is for the parties to be bound by the court's decision and their consent to the one who purported to represent them is inescapable. Basing on the above submission the counsel for the Respondent prayed that the 1st point of objection be sustained.

Submitting for the 2nd point of preliminary objection the counsel for the Respondent argued that, the Applicant filed the present application without first seeking and filing the mandatory notice of intention to seek revision (CMA F10) in the Commission for Mediation and Arbitration and serving the same to the adverse party before lodging the application for revision contrary to Regulation 34(1) of the Employment and labour Relations (General) Regulation GN No. 47 of 2017. To cement on this point, he cited the case of **Unilever Tea Tanzania Ltd V Paul Basondole**, Labour Revision No 14 of 2020(Unreported). Basing on the above submission the counsel for the Respondent prays that the 2nd point of preliminary objection be sustained.

With regard to the 3rd point of preliminary objection, the counsel for the Respondent submitted that, the affidavit in support of application is incurably defective for contravening the provision of Rule 24(2)(c) of the Labour Court Rules, GN No. 106/2007. That, the said affidavit also does not contain the reliefs sought thus contravene the provision of Rule 24(3) (d) of GN No. 106/2007. The counsel for the Respondent are of the view that, the affidavit by Paulo Silvin Salaho contravenes the mandatory requirement of the law hence defective and cannot support the present application. reference was made to the case of **Home**

African Investment Corporation Ltd v Maiko Nkya, Revision No.

820 of 2019(Unreported) where the affidavit containing no reliefs was struck out.

Responding to the 1st point of preliminary objection the counsel for the Applicants submitted that, to ascertain if the case is fit for revision the determination is whether there was material irregularity committed by the trial court. That, the representative in this matter originated from consolidation of the matter by the CMA under rule 24(1) and (3) of G. N 64/2007, Labour Institution (Mediation and Arbitration). That, the representative suit was made before the CMA proceeding and Jackson Mungure Mungure was appointed to be the representative. That, in course of the proceedings the arbitrator ordered the two parties to consolidate files to be heard jointly as the source of complaint was the same for the parties against the same employer. That the Arbitrator complied with Rule 24 (1)(3) and allowed the representation before the CMA.

Replying on the 2nd point of preliminary objection the counsel for the Applicants submitted that, the Applicant filed the present revision application in compliance to the law. The counsel contended that, the practice with this court is that CMA F10 was made purposely to notify the CMA the intention to seek revision to the High Court and please the

CMA to forward as possible the certified copies of proceedings and award to the High Court. That, the High Court has the power to call the records from CMA hence the submission made by the counsel concerning the cited Regulation 34(1) of the Employment and Labour Relations (General) Regulation GN No. 47 of 2017 is irrelevant. They thus pray that the objection be overruled.

On the 3rd point of preliminary objection, the counsel for the Applicants submitted that, the Applicants' affidavit under paragraph 6 has mentioned the reliefs sought hence complied with the requirement of the law. In concluding, the Applicants pray for this court to move away with technicalities and be guided by the overriding principle and proceed to hear the case on merit.

In a brief rejoinder the counsels for the Respondent submitted that, the Applicants' advocates have misconstrued the consolidation of the suit and the representative suit. They contended that, consolidation of suits aims at preventing multifarious suits where reliefs sought are the same while under the representative suit it aims at ensuring that the party to the suit waives his or her right by giving consent to another person who shall appear and prosecute or defend on his behalf.

That, the procedure for representative suit at the CMA and the Labour Court differs as they are governed by different laws. That,

procedure at CMA is governed by Rule 5(2)(3) of GN No 64/2007 while in labour courts is governed by Rule 44(2) of the Labour Court Rules GN No. 106 of 2007. To buttress their submission, they cited the cases of **21st Century (ltd) V Octavian Undole & others**, Lab Div., MRG Lab Revision No 10 of 2012 (1-13_LCCD at page 86 and **Ally Mgomba and 4 others V Tanzania Building Workers Ltd** HC Labour. Div. DSM (2015) LCD 96. They insisted that, Rule 5(2)(3) of GN No 64/2007 does not apply nor binds the Labour Court. That, the Applicant was wrong to think that because the Applicants were represented at the CMA then a person who purported to represent others may proceed in revision.

To support this point, they referred the case of **Ally Mgomba and 4 others Vs Tanzania Building Workers Ltd**, HC Labour Division at DSM (2015) LCD96. The counsel for the Respondent were of the view that, in every stage of the case leave is paramount where one purports to represent others. They added that, in a situation where an affidavit is sworn while no leave procured the same affidavit will be considered of the affiant only. Reference was made in the case of **Abdul Samwadu Mohamed & Others V Dar es salaam Water and sewerage Authority and Dar es Salaam Water and Sewerage Corporation** HC DSM (1015) LCD page 41. In concluding the counsel for the Respondent insisted that, the application at hand cannot stand

the test of Rule 44(2) of GN No. 106 of 2007. That, as there is no leave for representation, they pray for the objection to be sustained.

On the 2nd and 3rd points of preliminary objection the Respondent's counsel reiterated the submission. In concluding they reiterated the prayer that the application be dismissed on contravention of the mandatory provisions of the law.

I have considered the records and the submissions by the counsel for the parties. Starting with the first point of preliminary objection based on leave of a part to the case to stand on behalf of others, I agree that such a requirement is provided for under Rule 44(2) of the Labour Court Rules, GN No. 106 of 2007. The provision clearly requires that, where there are numerous persons having the same interest in a suit, one or more of such persons may with the permission of the court appear and be heard or defend the suit on behalf of others, but those other parties must be made aware of the representation.

I therefore agree with the submission by the counsel for the Respondent that leave is mandatory for an employee who wants to appear in a representative capacity in a suit before CMA or Labour Court. This is also the holding of this court in the case of **Christopher Gasper and Richard Rukizangabo and 437 others (supra)**. This court was clear also in the case of **Ally Mgomba and 4 others Vs**

Tanzania Building Workers Ltd, (supra) on the importance of leave for a party to act on behalf of others. It becomes necessary at every stage of a case for a party to obtain leave to represent others to enable the court to know whether all parties have intention to pursue the matter on appellate, revision or review stage. That will impose responsibility of the party to the outcome of the case.

The Court of Appeal in **KJ Motors Ltd V Richard Kishimba & others**, Civil Appeal No 74 of 1999 CAT at Dar es Salaam (Unreported) Cited with approval from the case of **Sarah Haonga & 2others v. Viettel Tanzania Ltd**, Misc. Application No. 179/2019 HC, Land Division at Dar es Salaam (Unreported) where it was held that,

"The rationale for this view is fairly apparent where, for instance, a person comes forward and seeks to sue on behalf of other persons, those other persons might be dead, non-existent or either fictitious. Else he might purport to sue on behalf of persons who have not, in fact, authorized him to do so. If this is not checked it can lead to undesirable consequences. The court can exclude such possibilities only by granting leave to the representative to sue on behalf of person whom he must satisfy the court they do exist and that they have duly mandated him to sue on their behalf."

In this application, the Applicant's affidavit under paragraph 1 and 2, the deponent states that he is the representative of other Applicants

who were also the Applicants in the CMA/ARS/KRT/ARB/139 & 167/2020. Nothing was attached to verify his representation or consent from other other Applicants showing that they have appointed one them to be their representative in this matter.

The contention by the counsel for the Applicant that the representative suit was made before the CMA proceeding and Jackson Mungure was appointed to be the representative, in compliance with Rule 24(1) and (3) of G. N 64/2007, Labour Institution (Mediation and Arbitration) Rules is unwarranted. That provision was invoked in consolidating the proceedings as parties in two case files has similar interest against the same employer. It is however in CMA records that one Jackson Mungure applied to represent others and attached the signatures from all Applicants. Such representation before CMA cannot stand valid in the present application before the High Court. In line with the above cited decisions, I find merit in the first point of preliminary objection and it is hereby sustained.

In answering the second point of preliminary objection, I find the same to have merit as well. The application is incompetent for failure to issue a mandatory notice of intention to seek for revision under CMA F10. Regulation 34(1) provides that: -

*"The forms set out in the Third Schedule to these Regulations **shall** be used in all matters to which they refer" (emphasis provided).*

Among the forms set under the third schedule is CMA F.10 which is a notice of intention to seek for revision of award. The provision Regulation 34(1) impose mandatory requirement to use of F.10 in making a notice of the intention to seek revision as it uses of the word '*shall*'. With the wording of the provision, the CMA F.10 must be issued prior to the institution of a revision to this court.

It was contended by the counsel for the Applicants that, CMA F10 is not mandatory as its purpose is to notify the CMA of the intention to seek revision to the High Court and please the CMA to forward as possible the certified copies of proceedings and award to the High Court. That, much as the High Court has the powers to call the records from CMA, applicability of Regulation 34(1) of the Employment and labour Relations (General) Regulation GN. No. 47 of 2017 becomes irrelevant.

I agree with the submission by the Counsel for the Respondent and subscribe to the reasoning in the case cited of **Unilever Tea Tanzania Ltd**(supra). Also, this court when faced with a similar issue in the case of **Arafat Benjamin Mbilikila V NMB Bank PLC**, Revision No 438 of 2020 HC at Dar es Salaam at pg. 9 it held that,

"As far as the records are and taking from the submissions of Mr. Seka, it has not been disputed that the said Form No. CMA F.10 was not lodged at the CMA prior to the filing of this revision application. Since the word "shall" has been used in the Regulation that created the Forms, the omission to do so is a fatal defect that cannot be cured by a simple argument. Owing to that I find the application before me to be fatally defective for failing to comply with the mandatory provisions of the Regulation 34(1) of the Regulation and consequently, the application is hereby struck out."

Applying the same principle to this application, I find it that this application is incompetent with no legal legs to stand before this Court for contravening the provision of Regulation 34(1) of the Employment and labour Relations (General) Regulation GN. No. 47 of 2017.

On the third point of preliminary objection that the affidavit is incurable defective for not containing the reliefs sought, I find this objection meritless hence, I overrule the same. The Applicant claimed that the relief sought can be found under paragraph 6 of the affidavit. For easy of reference the said paragraph is hereunder reproduce: -

"That I depose this affidavit in support of the orders sought in chamber summons"

I agree with the Applicant that under paragraph 6 of the affidavit the Applicant though did not categorically list the reliefs, it referred the

prayer made under the chamber application as relief sought for. The said chamber summons being part of the documents filed in this application, I do not see how referring the reliefs under the chamber application can be an incurable defect. Much as the prayers under the chamber summons are clear, it becomes obvious that the parties were made aware of what the Applicant was seeking before this court.

On the claim by the Applicant that this court should move away with technicalities and be guided by the overriding principle and proceed to hear the case on merit, I find his prayer inapplicable in the present circumstance. The overriding objective cannot be used as a shield to allow non-compliance to the legal requirements. Indeed, in this matter the defects found renders the application incurably defective.


In the upshot, I sustain the first and second grounds of the preliminary objection in the notice of additional preliminary objection. Representation under Rule 44(2) of the Labour Court Rules, GN No. 106 of 2007 goes to the roots of the matter as it touches the competency of the party appearing in court on behalf of others hence incurable defect. Similarly, non-compliance Regulation 34(1) of the Employment and labour Relations (General) Regulation GN. No. 47 of 2017 is an incurable defect. The remedy available for the above defects is to strike out the

application. Consequently, I struck out this application for being incompetently filed before this court.

Order accordingly.

DATED at **ARUSHA** this 23rd day of June 2022.




D.C. KAMUZORA

JUDGE

