

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT ARUSHA

REVISION NO. 89 OF 2021

*(Application for Revision of ruling and drawn order in Labour Dispute No
CMA/MNR/HNG/06/21 for the Commission for Mediation and Arbitration for Manyara
Babati)*

RILASH KALAIYA APPLICANT

VERSUS

NGANO LTD RESPONDENT

RULING

14/04/2022 & 23/06/2022

KAMUZORA, J.

The Applicant Rilash Kalaiya being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) preferred this revision under sections 91(1), (d) and (e) of the Employment and Labour Relations Act Cap 366 R.E 2019 and Rule 24(1) 24(2) (a) (b) (c) (d) (e) (f) and (3) (a) (b) (c)(d) and Rule 28(1) (c) (d) & (e) of the Labour Court Rules G.N No. 106/2007. The Applicant prays for this court to revise and set aside the whole ruling and drawn order on dismissal made against Applicant dated 23/08/2021 in Labour Dispute No. CMA/MNR/HNG/06/21.

The application is supported by an affidavit sworn by Erick Erasmus Mbeya the Applicant's advocate. The application was strongly opposed by the Respondent through a counter affidavit deposed by Noel Nchimbi the advocate for the Respondent accompanied by a notice of preliminary objection on points of law that: -

1) That, the Applicant's affidavit is purely defective in law for contravening the provision of Rule 24(3) (a), 24(3) (b), 24(3) (c) and 24(3) (d) of the Labour Rules, Government notice No 106 of 2007.

2) That, the Applicants Affidavit is purely defective in eyes of the law for contravening the provision of Order VI Rule 15(3) of the Civil Procedure Act Cap 33 R.E 2002.

Hearing of the preliminary Objection was by way of written submissions and as a matter of legal representation, the Applicant enjoyed the service of Mr. Mbeya while the Respondent was dully represented by Ms. Happiness Mbiduka. Both parties filed their submissions as scheduled save that the Applicant preferred not to file rejoinder submission.

Submitting in support of the 1st point of preliminary objection, the advocate for the Respondent argued that, it is a trite law that the affidavit of the Applicant must contain contents prescribed under Rule 24(3) (a) (b) (c) and (d) of the Labour Court Rules GN No. 106/2007. That, the said Rule uses the word 'shall' which imports a mandatory obligation as per section 53(2) of the Law of Interpretation Act Cap 1 R.E 2002. To buttress his submission, the counsel for the Respondent cited the case of **James Daniel v Cats-Net Limited**, Labour Revision No 258/2017 HC(Unreported) to where it was held that application supported by defective affidavit out to be struck out.

On the 2nd point of preliminary objection, the counsel for the Respondent submitted that, the Applicant's Affidavit is defective contravening Order VI rule 15(3) of Cap 33 R.E 2002 as it omitted to indicate the date, signature and the place in which the deponent was making the verification at which it was signed. That, the verification clause under the Applicant's affidavit is not dated as required by Order VI rule 15(3) of Cap 33 R.E 2002. In support of his submission, he cited the case of **Said Risas v Zakaria Mbaratani (Kisheri Solution Ltd)** Misc. Land Appl No 34/2020, **Bora Industries Ltd V Idd Dilunga and others**, Revision Application No 10/2010 HC at Dar es Salaam to insist

that where affidavit does not indicate the date, place of verification and signature on the verification clause becomes fatal and renders the affidavit incurably defective.

Basing on the submission and the authorities cited above the Respondent prays that this court to find merit in the preliminary objection and dismiss the Applicant's application.

Responding to the submission made by the counsel for the Respondent Mr. Mbeya, counsel for the Applicant raised the issue of wrong citation of the case number by the Respondent. He claimed that, while what is filed in court is Revision application No. 89 of 2021 the Respondent cited it as Application for Revision no 89 of 2021. To him these are two different cases.

On the 1st point of preliminary objection the counsel for the Applicant submitted that, it is a cardinal principle that a preliminary objection should hinge on point of law as in the case of **Mukisa Biscuits manufacturing Co Ltd. V West End Distributors Ltd** (1969) EA 696. That, the Respondent's contention needs proof as a result fall short from being a pure point of law. That, the Respondent failed to particularize or plead what the impugned provisions of law requires. That, neither the Applicant nor the court is aware of the nature

and scope of the raised preliminary objection as the Respondent herself failed to substantiate. He cited the case of **James Burchard Rugemalira v R and Mr. Habinder Singh Sethu**, Criminal Application No 59 of 2019, CAT at Dar es Salaam. He added that section 94 (1)(d) and (e) of the Employment and Labour Relations Act Cap366 RE 2019] and Rule 28 (1)(c)(d) and (e) of the Labour Rules,2007, GN No. 106/2007 are in co-existent Applicant's revision. He contended that, by virtue of decision in the case of **Mustapha Muhindi & 135 others vs. C.R.J.E East Africa Limited** (supra), the provision of Rule 24 (3)(a), (b), (c) and (d) are nugatory as the present matter is a revision and not original application in original jurisdiction. The Applicant invited this court to adopt the appropriate procedures being guided by Rule 55 (1) and (2) of GN No. 109 of 2007.

The Applicant submitted further that, if the court still finds the Preliminary objection merited then being the court of equity it should hold that the redress is to amend defective affidavit. In support of the submission he cited the case of **Nasreen Hassanali Vs. Aga Khan Health Services Tanzania**, Revision Application No 84 of 2021 HC at Dar es Salaam (Unreported), **Mustapha Muhindi & 136 others** (Supra, **Patrick Itule Vs. Diamond Trust Bank(T) Ltd**, Misc. Labour

Application No 672/2019 HC at Mtwara(Unreported), **National Union of Mines and Energy and Another V Dangote Cement Industry and Two Others**, Application for Labour revision No 4 of 2020 HC at Dar es Salaam (Unreported), **Rachel H. Kamtawa Gal Vs. Gulf Badr Group (T) Ltd**, Revision 688/2019 HC at Dar es Salaam (Unreported), **John Wenzagi v K.K Security**, Revision No. 465/2018 HC at Dar es Salaam (Unreported)

Regarding the 2nd point of preliminary objection, the Applicants counsel submitted that, the Respondent argument that the Applicant's affidavit ought to indicate date, signature and place where the same was verified is misleading. He contended that, the Respondent's objection is propounded under VI Rule 15 (3) of the CPC Cap 33 RE 2002. He was of the view that, the cited law by the Respondent the Civil Procedure Act Cap 33 RE 2002 does not exist but rather what exists is the Civil Procedure Code Cap33 R.E 2019. That, the objection raised under improperly cited law cannot stand. To cement his submission, he cited the case of The **Registered Trustees Archdiocese of Dar es Salaam V Aelmarsi Kamili Mosh**a, Misc. Land Application No 32 of 2019 HC at Dar es Salaam (Unreported) and **Thomas David Kivumbuyo and Abbas S. Mhanga Vs. Tanzania**

Telecommunication Co. Ltd, Civil Application No.62/2010 CAT at Dar es Salaam (Unreported)

The counsel for the Applicant added that, the CPC under Order VI Rule 15(3) does not cover for the issue of affidavit but rather for pleadings. That, under the same law, Order VI rule 1 it states that pleadings mean plaint or a written statement of defence. In support of this issue, he cited the case of **Loshya Investment Limited V Visiontech Computers Limited**, Commercial case No 56 of 2005 HC at Dar es Salaam (Unreported), **Nasreen Hassanali v Aga Khan Health Service Tanzania (Supra)** and **Alex Doto Massaba v the Attorney general and 3 others**, Misc. Civil Cause No 30 of 2019 HC at Dar es Salaam (Unreported)

The counsel explained and further added that, there is no law governing verification of affidavits. That, it is not the requirement of the law and if any, the same is a matter of practice. He referred the case of **Nasreen Hassanali (Supra)**. He contended that, the law requires the affidavit to incorporate who takes the oath, where and when in the jurat. He insisted that, the date, signature and place where deponent verified is not requirement of the law and even if the same could be mandatory requirement, the law does not state how affidavit need to be

verified. The counsel added that, the redress for defective verification had always been to order amendment not dismissal. He supported his submission with the case of the **Philip Anania Vs. Returning Officer Njombe North Constituency, The Attorney General and Jackson Makweta**, Misc. Application No 7/1995 (Unreported).

The counsel referring Order VI Rule 17 of the Civil Procedure Code and section 97 as well as Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, urged this court to dispense justice without legal technicalities. In support of his submission, he cited the cases of **Yakobo Magoiga Gichere V Peninah Yusuph**, Civil appeal No 55 of 2017 CAT at Mwanza (Unreported), **Jacqueline Ntuyabaliwe Mengi and 2other v Benson Benjamin Mengi and 5 others**, Misc.Civil Application No. 486 of 2019 HC at Dar es Salaam (Unreported), **Halfan Msawanga V Ephraim G. Mwakapala and another**, Misc. Civil Application No 472 of 2019 HC at Dar es Salaam (Unreported).

I will first address the issue of wrong citation/reference to the case number raised by the Applicant. He claimed that, while what is filed in court is Revision application No. 89 of 2021 the Respondent cited it as Application for Revision no 89 of 2021. To him these are two different cases.

Looking at the Respondent's counter affidavit, notice of preliminary objection as well as the Respondent's submission made in support of the preliminary point of objection, the counsel referred the application as Application for Revision No. 89 of 2021. From the Applicant's notice of application and the chamber summons, this revision was preferred under sections 91(1), (d) and (e) of the Employment and Labour Relations Act Cap 366 R.E 2019 and **Rule 24**(1) 24(2) (a) (b) (c) (d) (e) (f) and (3) (a) (b) (c)(d) and **Rule 28**(1) (c) (d) & (e) of the Labour Court Rules G.N No. 106/2007. Rule 24 of GN No. 106 of 2007 govern Applications generally under labour disputes and Rule 28 of GN No. 106 of 2007 is a specific provision for revision. I therefore do not see any fatalness in the Respondent's move to refer the matter as revision application for revision. I will therefore not detain myself to that issue as it does not contravene the law even or go to the root of the matter. I will therefore direct myself to the submission in support of the preliminary objections and the Applicant's response to the same.

Having settled that, let me revert to the determination of the preliminary points of objection raised by the counsel for the Respondent. Starting with the 1st point of preliminary objection the Respondent contends that the Applicant's Affidavit is purely defective in law for

Contravening the provision of Rule 24(3)(a), (b), (c) and (d) of the Labour Court Rules GN No 106 of 2007. It was contended by the Applicant's counsel for the Applicant that the Rule 24 (3)(a), (b), (c) and (d) is inapplicable to the present matter which is a revision and not original application in original jurisdiction. Surprisingly, the same provision was cited by the Applicant in the Applicant as one among the enabling provision to this revision. In my understanding, Revision application is one among the application that can be filed under Labour Court Rules. A person filing revision under Rule 28 must also comply with the requirement under 24. Thus the contention by the Applicant that this court should be guided by Rule 55 (1) and (2) of GN No. 109 of 2007 is uncalled for. I maintain that revision application like any other application must comply to the requirement under Rule 24 of the Labour Court Rules. For easy of reference the said Rule is hereunder reproduced,

"24 (3) the application shall be supported by an affidavit, which shall clearly and concisely set out: -

(a) the names, description and address of the parties:

(b) a statement of material facts in a chronological order, on which the application is based:

(c) the statement of legal issues that form the material facts; and

(d) the relief sought."

Reading the Applicant's affidavit filed in support of the application, it is evident that it does not contain the names, description and address of the parties. It however, contains the statement of material facts in a chronological order, on which the application is based under paragraph 2 to 4 of the affidavit in support of application. The affidavit also contains the statement of legal issues that form the material facts under paragraph 5 (i to iii) and the reliefs sought is evidenced at paragraph 6 which makes reference to the reliefs under the chamber application. Thus, the only defect here is non-inclusion of the names, description and address of the parties in the affidavit which makes the 1st point of preliminary objection to stand. Now the question is whether such defect is curable and what remedy is available.

I understand that where the provision is couched on the mandatory terms, the same must be complied with unless the court finds it reasonable to direct otherwise. In my view, the defect in this affidavit does not go to the root of the matter or determine the rights of the parties conclusively. Thus, in the wake of overriding principle the same is curable. In that regard, I agree with the counsel for the Applicant that the court can direct compliance of the law for the rights to the parties to be determined.

On the 2nd limb of preliminary point of objection, it was contended by the counsel for the Respondent that, the Applicant's Affidavit is defective contravening Order VI rule 15(3) of Cap 33 R.E 2002 as it omitted to indicate the date, signature and the place in which the deponent was making the verification at which it was signed. The counsel for the Applicant attacked the objection for being raised under the wrong provision of the law. He submitted that, Cap 33 R.E 2002 is no longer applicable as the proper applicable law is Cap 33 R.E 2019 and thus the proper citation could be Order VI Rule 5(3) of the Civil Procedure Code Cap 33 R.E 2019.

I agree with the counsel for the Applicant that the second objection was raised on the wrong provision of law. The legal position was made clear by the Court of Appeal in among other case that of **Chama cha Waalimu Tanzania V AG**, Civil Application No 152/2008 (Unreported quoted with approval in the case of **Barclays Bank Tanzania Ltd v Phylisiah Hussein Mcheni**, Application No 239 of 2013 where it was held that,

"... Non citation and or wrong citation of an enabling provision render the proceeding incompetent. Decision of this court in which

this principle of law has been enunciated are now legendary..."

(emphasis original)

Since the Preliminary points of law emanates from a wrong provision of law it cannot be regarded as a point of law. But assuming that there was correct citation of the provision by the Respondent, still I do not see how omission to indicate the date, signature and place for the verification can be an incurable defect. This was so decided in a number of cases and one of the principles governing affidavits, provides that a defective affidavit can be amended. See **Salima Vnai Foun Vs. Registrar of Cooperative Society and Three others** [1995] TLR 75 where it was stated that-


"Further, it now settled and for that I reason I differ with what the decision in....., that a court has discretion to allow a deponent of an affidavit lacking a verification clause to amend the affidavit. It take, it that by using the "amend" this Court meant that the Courts can, if circumstances justify it, grant leave to the deponent to file an affidavit having a verification clause. I hold this view because I take (it) to be an undisputed proposition of law that something that is null and void is incapable of being amended. Being a discretion on power, the power to grant leave to a deponent to file an affidavit which has a verification clause must be exercised with justice and common sense."

From what has been stated above and based on the fact that the second preliminary point of objection was brought under the wrong provision of law, the same lacks legal legs to stand and it is hereby overruled.

In the final analysis, I find the affidavit in support of application defective. However, the defects are not fatal as they do not go the root of the matter and can be cured by amendment. I therefore exercise my discretion to grant leave to amend the affidavit to rectify the defects. The amended affidavit shall be filed on or before 30/06/2020. Costs shall be in due course.

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




D.C. KAMUZORA
JUDGE