

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LABOUR REVISION NO. 06 OF 2019.

**(Arising from Labour Dispute No. CMA/IR/MAF/52/2016, in the
Commission for Mediation and Arbitration of Iringa, at Iringa)**

BETWEEN

PYRETHRUM COMPANY OF TANZANIA..... APPLICANT

AND

REHEMA CHIOKO RESPONDENT

RULING

24th February & 16th May, 2022.

UTAMWA, J.

This is a ruling on what I can term as cross-preliminary objections (cross-POs) for purposes of convenience in this ruling. The first PO was raised by the respondent REHEMA CHIOKO. It was against the application at hand preferred by PYRETHRUM COMPANY OF TANZANIA (the applicant). The application essentially moves this court to revise the award issued by the Commission for Mediation and Arbitration of Iringa, at Iringa (the Commission). The other PO was raised by the applicant against the respondent's notice of opposition contending that, the same was untimely filed.

In this application, the applicant was represented by Mr. Jassey Mwamgiga, learned counsel whereas the respondent was represented by Mr. Faraja Msuya, also learned counsel. The court decided to hear the POs cumulatively and by way of written submissions for the sake of justice, speed and convenience. In this ruling however, I will firstly consider the PO raised by the respondent since it challenges the competence of the application. This means that, in case the same will be upheld, then it will not be legally necessary to consider the PO raised by the applicant.

Now, regarding the PO raised by the respondent, it is undisputed by the parties that it was raised through the respondent's Notice of Opposition. Initially, the PO was based on the following three limbs:

1. The applicant has failed to move this honourable court for failure to properly cite the enabling provisions of the law.
2. The application before this honourable court is incompetent.
3. The affidavits supporting this application are fatally defective for failure to abide with the rules of drafting affidavits before this honourable court.

In his written submissions however, the respondent's counsel abandoned the first limb of his PO. He thus, argued only the second and third limbs. I opt to firstly determine the third limb of the PO for purposes of convenience.

Regarding the third limb of the PO, it is apparent that the respondent's counsel argued the first and second limbs of the PO together.

However, one can easily identify the arguments related to the first limb from those concerning the third limb. I will thus, concentrate on the arguments related to the third limb only, since it is now under consideration. In supporting this limb of the PO, the respondent's counsel essentially argued (from the 4th paragraph of the third page of his written submissions onwards), that, rule 24(3)(a), (b), (c) and (d) of the Labour Court Rules, GN. No. 106 of 2007 (the LCR) requires an affidavit supporting an application like the one at hand to state concisely the names, description and addresses of the parties, statement of material facts in a chronological order on which the application is based, a statement of legal issues that arise from the material facts and the reliefs sought. It was his view that, the applicant's affidavit violated this rule for want of required contents, hence incurably defective.

The respondent's counsel supported his above contentions by a holding of this court (Nyererer, J. as he then was) in the case of **James Daniel v. CATS-NET Limited, Revision No. 258 of 2017, High Court, Labour division, at Dar es salaam** (unreported) which followed its previous decision in the case of **Berkley Electric Ltd v. Christopher Mussa Revision No. 236 of 2008** (unreported by Reweyemamu J. as she then was). In the said **James case** (supra), he argued, it was held that, the affidavit which supported the application was incurably defective since it lacked the statement of legal issues which had arisen from material facts as required by rule 24(3)(c) of the LCR.

It was also the contention by the learned counsel for the respondent that, all the affidavits supporting the application at hand did not comply with section 24(3) of the LCR. This rule has to be complied with for purposes of achieving its objectives. He thus, urged this court to strike out the application for incompetence.

In his replying submissions regarding the third limb of the PO, the learned counsel for the applicant advanced arguments which can apply to both the second and third limbs of the PO (see from the first page to third paragraph of the second page of his written submissions). He also made contentions which apply to the third limb only (see from the third paragraph of the fourth page to the fifth paragraph of the same page). I will thus, consider all such arguments at this juncture though I am principally testing the third limb of the PO only as I hinted before. I do so following the intermingling nature of the points of law raised by both sides and for purposes of giving a full fair trial to the parties.

In the contention by the applicant's counsel that apply to both the second and third limbs of the PO, her counsel submitted that, the respondent lodged her PO through her notice of opposition and not thorough a notice of preliminary objection. Nevertheless, a notice of preliminary objection and a notice of opposition are two distinct documents and they serve different purpose. The notice of opposition intends to notify the other party that, the respondent intends to oppose or defend the application. On the other hand the notice of preliminary objection is used to notify the opposite party that on the date fixed for hearing the

respondent shall raise a preliminary objection on points of law. He added that, according to rule 24 (4)(b) of the LCR, a notice of opposition needs to be substantially in conformity with Rules 24(1) and (2). These provisions requires the notice of opposition to comply with Form No. 4. The law does not thus, permit a notice of opposition to contain a preliminary objection. Objections on point of law are raised by way of notice of preliminary objection and not by way of notice of opposition.

Furthermore, the applicant's counsel argued that, since the PO at hand is contained in the notice of opposition, and since the notice of opposition was lodged in court out of the time prescribed by the law and is thus, liable to be dismissed, then the court should consider the PO at issue as non-existing.

On the arguments applying to the third limb only, the leaned counsel for the applicant contended that, the PO raised by the respondent is not fit to the legal meaning of a PO since it is not self-explanatory as required by the law. He supported the contention by the decision of the Court of Appeal of Tanzania (the CAT) in the case of **James Burchard Rugemalira v. The Republic and another, Criminal Application No. 59/19 of 2017, CAT, at Dar es Salaam** (unreported). The PO was also based on allegations that the application lacks the affidavit of one Mwamgiga Samuel Creluy Njegere which is mentioned in the chamber summons as the supporting affidavit. However, the inquiry in the court record shows that, the affidavit was attached to the chamber summons together with affidavits sworn by other persons. This fact therefore, needs

proof by evidence. It cannot thus, in law, base a PO. He cemented this position of the law by citing the case of **Shose Sinare v. Stanbic Bank Tanzania Ltd & Another, Civil Appeal No. 89 of 2020, CAT at Dar es Salaam** (unreported). He thus, prayed for this court to overrule the PO so that the matter can be heard on merits.

Owing to the above reasons, the learned counsel for the applicant urged this court to overrule the PO.

In his rejoinder submissions, the respondent's counsel essentially reiterated the contents of his submissions in chief. He further submitted that, the allegation that the objection raised does not qualify as a PO in law is misconceived. He also disputed the allegation by the applicant that he did not provide necessary particulars of the PO. The applicant's counsel did not also shown as to how his client was prejudiced by the notice of the PO being included in the notice of opposition. He urged the court to apply the doctrine of overriding objective to cure that error. He further submitted that, there can never be an objection against a PO.

The respondent's counsel further submitted that, though the applicant alleges that this application is uncontested due to failure to file the notice of opposition on time, the court should take judicial notice that there is serious violation of law and procedure that renders this application incompetent. The application should therefore, be struck out, he contended.

I have considered the record, the rival arguments by the parties and the law. In my view, it is incumbent that, I consider the challenge raised by

the applicant's counsel against the PO. In fact, though it is true as argued by the learned counsel for the respondent that there cannot be a PO against a PO, the law does not preclude a party against whom the PO is raised from challenging a PO on legal grounds as long as that challenge does not bar the hearing of the PO.

The applicant's challenge against the third limb of the respondent's PO is based on some arguments including the following: firstly, that, it was legally wrong for the respondent to lodge her PO through her notice of opposition as differentiated from the notice of preliminary objection. In my view, this challenge lacks legal support. The applicant's counsel himself did not cite any law that sets a prohibition against combining a notice of PO in the notice of opposition. I however, agree with the learned counsel for the applicant that, it is the practice of this court that, notices of PO are raised independently from other court documents. This practice is however, not law. There is also no law which sets the procedure on how a notice of PO can be lodged in court. This situation does not thus, support the contention by the applicant's counsel. It is more so because, a PO is expected to be on pure point of law: see the case of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors [1969] EA 701**. The law also guides that, courts of law are enjoined to decide matters before them according to the law as correctly contended by the respondent's counsel. A court of law cannot thus, close eyes to a PO based on point of law, merely because the PO has not been brought according to the practice.

As to the contention by the applicant's counsel that the PO cannot survive because the notice of opposition in which it is contained was filed out of time, I am of the settled opinion that, this contention is also weak. This is because, a PO has no time limitation in law. It can be raised at any time before the main matter is heard before the court. It follows thus, that, whether the notice of opposition was time barred or not (which said issue can properly be considered in deciding the second limb of the PO), it does not matter as long as the court has received the notice of the PO based on a point of law.

Furthermore, though I agree with the argument by the applicant's counsel that rule 24 (4)(b) of the LCR in fact, sets the contents of a notice of opposition and such contents do not include the notice of a PO, I do not agree with him that this is the reason for this court to disregard the third limb of the PO raised by the respondent. It is more so since the PO fits the qualifications set in the **Mukisa case** (supra). These views are based on the fact that, the provisions of such rule are not restrictive by nature to the extent of making the notice containing extra contents incurably defective. Those provisions of law are only prescriptive or instructive in the sense that, they merely give guidance on what should be contained in the notice of opposition. It follows thus, that, a notice of opposition may be defective for not including the contents set under the provisions of such rules. Nonetheless, such notice cannot be defective for enveloping extra contents therein, i.e. beyond those set under the rule cited supra which do not cause injustice to any party.

It is therefore, my firm finding that, the respondent's act of including the notice of the PO in the notice of opposition might have been irregular yes. Nevertheless, the irregularity was not legally fatal enough to the extent of making the notice of the PO a non-existing creature. The same did not also prejudice the applicant in any way, and the applicant's counsel did not cite any injustice caused to his client by the abnormality. It did not thus, erode the requisite jurisdiction of this court to consider the third limb of the PO. The anomaly is therefore, curable under the principle of overriding objective as correctly contended by the learned counsel for the respondent. This principle essentially requires courts to *inter alia*, deal with cases justly, speedily and to have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported).

The other contention for the challenge advanced by the applicant's counsel against the PO was that, it was not self-explanatory as required by the law. This argument is, in my settled opinion, also unsustainable. This is because, the third limb of the PO as reproduced earlier is clear that the affidavits supporting this application are fatally defective for failure to abide with the rules of drafting affidavits. In his submissions in chief narrated earlier, the learned counsel for the respondent conspicuously cited specific rules of the LCR which he believed were offended. He also cited precedents of this court supporting the contention.

The applicant's argument that the third limb of the PO was based on facts that need evidential proof was likewise, untenable. This is because, the third limb was based on the affidavits supporting the application which are part of the record. In fact, the respondent's contention that the affidavit of one Mwamgiga is lacking was related to the second limb of the PO which is not subject to the present discussion. What is under consideration at this juncture is only the third limb of the PO as hinted earlier. This particular argument is thus, irrelevant at this stage.

Owing to the above reasons, I find that, the challenge by the applicant's counsel against the third limb of the PO is baseless. I will thus, proceed to test the merits of that limb of the PO.

The major issues regarding the merits for the third limb of the PO are thus, two as follows:

- i. Whether or not the affidavits supporting the application at hand offended the provisions of rule 24(3) of the LCR.
- ii. In case the first issue will be answered affirmatively, then whether the irregularity is incurable to the extent of making the application incompetent.

In relation to the first issue, it must be born in mind that, in his replying submissions, the applicant's counsel did not refute the contention that the affidavits supporting the application offended rule 24(3) of the LCR. His reaction was only limited to the challenge discussed above that, the PO was erroneously brought through the notice of opposition and was not

fitting the legal meaning of a PO. I have however, made a finding that his challenge was baseless. The argument by the learned counsel for the respondent that the affidavits offended the law cited above thus, goes uncontested.

Furthermore, it is not disputed by the parties that rule 24(3) of the LCR in fact, mandatorily provides that, an affidavit supporting an application like the one under consideration must envelop the contents listed above by the learned counsel for the respondent. It is also on record that the application at hand was supported by five affidavits. Each of the following persons swore one affidavit: Maingu Karogoje Buremo, Mwamgiga Samuel Creloy Njegere, Latoki Ngaho, Grace Sanga and Osmund Mahali. However, upon perusing all such affidavits, it is conclusive that they mainly narrated what had happened before the Commission and at the period before the matter was lodged before it. All the affidavits contained neither a statement of legal issues that arose from the material facts nor the reliefs sought by the applicant. The affidavits therefore, offended rules 24(3)(c) and (d) of the LCR respectively. I accordingly agree with the learned counsel for the respondent that the affidavits contravened the rules of drafting affidavits in supporting applications of the nature under discussion. I consequently answer the first issue posed above affirmatively that, the affidavits supporting the application at hand actually offended the provisions of rule 24(3) of the LCR. This finding calls for the testing of the second issue.

Regarding the second issue, I am settled in mind that, a statement of legal issues that arose from the material facts and the reliefs sought by the applicant are important elements of an affidavit in applications of this nature. They in fact, constitute the actual reason for the application. They also disclose to the court and adverse party the triable issues to be tested by the court in the application for revision and the orders which the court may make in favour of the applicant. Non-disclosure of these elements therefore, places the court into a difficult position for deciding the application effectively. This is because, the court will remain unaware of the legal reasons for the application and the orders which it may make. The situation also puts the adverse party into an uncertain position, hence a snag in marshalling his/her defence properly. This situation thus, denies the adverse party of the right to fair trial. This right is fundamental and enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 RE 2002.

Owing to the significance of the right to fair trial (just mentioned above) in the process of dispensing justice, the CAT described it as follows: that, it is one of the cornerstones of any just society and an important aspect of rights which enables effective functioning of the administration of justice; see the case of **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora** (unreported). That right applies to both criminal and civil proceedings. A court of law cannot thus, condone any act by a party to judicial proceedings which offends the adverse party's right to fair trial. It follows therefore, that, the irregularities

in the affidavits under discussion cannot be cured by the principle of overriding objectives discussed previously.

Due to the above reasons, I agree with the decisions of this court in the **James case** (supra) and the **Berkley case** (cited above) that, the violation of section 24(3), especially sub-rules (c) and (d) is fatal and renders the application incompetent. I consequently find the present application incompetent. The third limb of the PO is therefore, upheld.

The findings I have just made above are forceful enough to dispose of the entire application without testing the second limb of the PO raised by the respondent. Furthermore, it will be a purposeless exercise to consider the PO raised by the applicant related to the delay in filing the notice of opposition. This is so because, such delay (which was undisputed by the respondent's counsel who also offered some explanations for it), has no any legal effect as long as it has been held above that the application at hand is incompetent. It is more so since an incompetent matter is a non-existent creature in law. The respondent cannot not thus, be legally blamed for delaying to react against a non-existing being. I will not therefore, consider the second limb of the PO of the respondent and the PO raised by the applicant. Otherwise, I will be performing a superfluous or an academic exercise which is not the core objective of the adjudication process like the one I am currently performing.

I accordingly strike out the application for the incompetence. Each party shall bear its own costs since this is a labour matter and it is not

evident that the application at hand was frivolous or vexatious so as to justify costs to the respondent. It is so ordered.


J.H.K Utamwa
JUDGE
15.05.2022

16/05/2022.

CORAM; Hon. M. Malewo, DR.

Appellant: absent.

Respondent: present.

BC; Ms. Gloria. M.

Court: Delivered in the presence of the respondent in person. Ms. Glory Makundi (clerk) also present. Right of appeal explained.


M. Malewo.
DEPUTY REGISTRAR
16/05/2022.