

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

**(IN THE DISTRICT REGISTRY OF BUKOBA)**

**AT BUKOBA**

**APPLICATION FOR REVISION NO. 03 OF 2021**

*(Originating from the Labour Dispute No. CMA/BMC/10/2020 of the Commission for Mediation and Arbitration at Bukoba)*

**REGISTERED TRUSTEES OF EVANGELICAL LUTHERAN CHURCH IN  
TANZANIA NORTH WESTERN DIOCESE.....APPLICANT**

**VERSUS**

**RETICIA LAURIAN..... RESPONDENT**

**RULING**

***Date of Ruling: 19.08.2022***

***A.Y. Mwenda, J***

The present ruling is in respect to the preliminary objections raised by the Respondent which reads as follows that;

- i. This application is incurably irredeemable defective for failure to issue and file notice of intention to seek for revision of award made under Regulation 34(1) of the Employment and Labour Relations (General Regulations, GN No. 47 of 2017;
- ii. The application is misconceived and bad in law as the court has not been properly moved;

- iii. The purported application is irredeemable defective for being accompanied with a defective affidavit in jurat of attestation;
- iv. This application is incurably defective and bad in law for being supported by defective notice of application which contravenes the mandatory requirement of Rule 46(1), (2) and (3) of the Labour Court Rules, GN. No. 106 of 2007;
- v. The application is irredeemable defective, incompetent and bad in law for being in great contravention of Rule 43 of the Labour Court Rules, GN. No. 106 of 2007.

When this matter came for hearing before me, Mr. Lameck John Erasto, learned counsel appeared for the applicant whereas Ms. Gisela Maruka and Ms. Pilly Hussein, learned counsels appeared for the respondent.

When invited to submit in respect of the preliminary objections, Ms. Pilly Hussein informed the Court that they are abandoning the (ii), (iii) and the (v) points of objections thereby remaining with the (i) and (v) point of objections which she was going to argue them separately.

With regard to the (i) point of objection Ms. Pilly Hussein submitted that it is the legal requirement that whoever seeks to file an application for a revision must file notice of intention to seek for revision of an award. In support thereof, she cited regulation 34(1) of the Employment and Labor Relations (General) Regulation, GN. No. 47 of 2017 Reg. 34(1) which reads:

*"The forms set out in the 3<sup>rd</sup> schedule to these Regulation shall be used in all matters to which they refer."*

The learned counsel submitted that under form 10 (which is CMA F. 10) the notice of intention to seek revision for an award is one of the forms referred to it. The learned counsel submitted that the cited provision is coached in mandatory words by using the word "shall" as described under S. 53(2) of the interpretation of laws Act, [Cap 1 RE 2020]. She said, in the present application, the applicant did not file a notice and for that matter the present application is incompetent.

With regard to the (iv) preliminary point of objection the learned counsel submitted that the present application contravenes Rule 46(1), (2) and (3) of the Labor Court's Rules, G. 106 of 2007 for failure to paginate the documents filed before the Registrar. She also submitted that there is a legal requirement of preparing an index which is required to be served to the opposite party before the hearing commence and the said document should be paginated according to the index. She added that in the present application, there is neither notice of application which is paginated nor index prepared and served to the respondent. The learned counsel said that the word "shall" which is used under S.53 (2) of Cap 1, is coached in mandatory forms. To support this point she cited the case of HAMZA OMARY ABEID VS. PRO MINING SERVICES, LABOR REVISION NO. 54 OF 2019 HC, at page 66 at para 2.

She thus concluded her submissions by stating that the present application is incompetent and as such it should be struck out.

Replying to the submissions by the counsel for the respondent, Mr. LAMECK JOHN, submitted that the learned Counsel for the respondent pegged her argument in the word "shall" which she said it is coached in mandatory form. The learned counsel said the points regarding how the forms should be submitted before the CMA are mere procedural as opposed to his client's cries for justice.

He said although Rule 34(1) and S.53(2) of Cap. 1 use the word "shall", to him failure to annex the said form did not prejudice the respondent because in the present application they annexed notice of application, chamber summon and affidavit which are key documents in this application. The learned Counsel added that the word shall is applied depending on the circumstances of the case. In support to this point he cited the case of FORTUNATUS MOSHA VS. WILLIAM SHIJA AND ANOTHER, [1997] TLR 41, page 43 CAT where it was held as follow;

*"We think that the use of the word shall does not in every case make the provision mandatory. Whether the use of word is such effect, will depend on the circumstances of each case."*

The learned counsel stressed that, failure to use the said forms cannot make the present application incompetent.

Mr. Lameck also submitted that failure to paginate the records and index is also not fatal since all which is needed was undertaken by filing notice of application, chamber summons and affidavit. To support this point, he cited the case of GUDLUCK KYANDO VS. REPUBLIC [2006] TLR 363 where the court said the use of word shall does not necessarily mean that the provision in question is mandatory. He also said that the said provisions should not be used to defeat justice and in support thereof he cited the case of GENERAL MARKETING COMPANY LIMITED VS. A. ASHARIFF [1980] TLR 61, (65).

The learned counsel said under the principle of overriding objective it is insisted on disregarding technicalities and focus on substantive justice. He cited the case of ALLIANCE ONE TOBACCO (T) LIMITED AND ANOTHER VS. MWAJUMA HAMISI as the administratrix of the estate of PHILEMON R. KILENYI AND ANOTHER, MISC. CIVIL APPLICATION NO. 803 OF 2018 HC (unreported) at page 3. He then concluded his submission in that the omission raised in the preliminary objections are minor and as such the said preliminary objections should be overruled to avoid multiplication of unnecessary cases.

In a brief rejoinder Ms. Pilly Hussein submitted that the learned counsel for applicant concedes that there is omission to comply with the law but is seeking a cover under the principle of overriding objective which should not be applied blindly. She said the principle of overriding objective cannot cure this matter. In

support to the said point she cited the case of RUBY ENERGY (T) LTD VS. RUBY RONDWAYS (T) LTD, CIVIL APPEAL NO. 3 OF 2018, CAT unreported, page 10.

The learned counsel also rejoined in that the raised legal requirements are not minor as one would ask what was the intention of the parliament.

With regard to Mr. Lameck's submission that such omission will not prejudice the parties Ms. Pilly Hussein submitted that this is a mandatory legal requirement by virtue of labor cases as opposed to other civil cases. She thus concluded her rejoinder by repeating to her previous prayer that the present application is incompetent as such it should be struck out.

After considering the rival submissions from both parties it is pertinent to note that both parties are in agreement that the present application is brought contrary to Regulation 34(1) of the Employment and Labor relations (General) Regulations, GN. No. 47 OF 2017 and Rule 46(1), (2) and (3) of the labor courts Rules, GN. 106 of 2007. With regard to the (i) preliminary objection it is to the effect that the applicant failed to file a notice as provided under Regulation 34(1) of the Employment and Labor relations (General) Regulations, GN. No. 47 OF 2017. The said Regulation reads as follows;

*"The forms set out in the third Schedule to these Regulations **shall** be used in all matters to which they refer."*

Under the CMA F.10, NOTICE OF INTENTION TO SEEK FOR REVISION OF AWARD is one of them forms falling under the said Regulation. In this application, the word SHALL is used and having gazed at the CMA F.10 this Court noted that the same is a sample set to be used in applications such as the present one. Ms. Pilly Hussein was of the view that the word SHALL makes that provision mandatory whilst Mr. LAMECK JOHN relying on the authority in the case of FORTUNATUS MOSHA VS. WILLIAM SHIJA AND ANOTHER, [1997] TLR 41 and GUDLUCK KYANDO VS. REPUBLIC [2006] TLR 363 was of the view that the word SHALL does not in every case make the provision Mandatory. I have considered the arguments by the learned counsels and came to an agreement with Ms. Pilly Hussein that the said provision is mandatory. As I have stated above CMA F.10 is a sample format on how the notice of intention to seek for revision of award should appear. By looking at the said form I have realized it is meant to serve two purposes. One is to notify the Arbitrator on the applicant's dissatisfaction with the commission's award and two, is to remind him to forward the certified copies of the proceedings and the award to the High Court. With this two purposes this court is of the view that using the said format is mandatory and as such, in the circumstances of this matter the word SHALL entails the provision in question is mandatory. For that matter Mr. LAMECK's argument that the present application is proper as it is accompanied by chamber summons and affidavit is unfounded because the aim of complying to the present application is different from what he prayed in his notice of application.

That being said this court finds merits with the (i) preliminary objection and it is thus sustained.

With regard to the (iv) preliminary objection regarding the applicant's failure to paginate the documents filed before the court, I have also gone through this regulation and noted the same reading as follows;

*"46-(1) In all contested proceedings, including applications for urgent reliefs, the documents that are filed with the registrar SHALL be paginated by the party initiating the proceedings.*

*(2) The party initiating the proceedings shall compile and serve an index on the other party before the matter is heard.*

*(3) The parties shall ensure that the copies of the documents filed with the Registrar are paginated in accordance with the index."*

In the present application, none of the above was complied with by the applicant. His advocate was of the view that such omission is minor. With respect this court is not in agreement with him because the use of word SHALL, in the circumstances of this case and basing on peculiarity of the labor matters which have their special procedures as opposed to normal civil cases, means the provision is mandatory.

In a bid to rescue this application, the learned Counsel for the Application prayed this court to invoke a principle of overriding objectives to overrule the preliminary objection and order the hearing of the present application to proceed. With respect this court is not in agreement with the learned counsel's argument. This is so because it is trite law that the said principal cannot be applied blindly on the mandatory provision of the procedural law which goes to the very foundation of the case. In the case NJAKE ENTERPRISES LIMITED VS. BLUE ROCK LIMITED AND ANOTHER, CIVIL APPEAL NO. 69 OF 2017, CAT (unreported) the court held inter alia that;

*"Also the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act. According to the Bill it was said this;*

*"The proposed amendment are not designed to blindly disregard the rules of procedure that are coached in mandatory terms."*

From the foregoing, the principle of overriding objective cannot apply in the present application and for that matter this court finds merits in the preliminary objection and as such this application is struck out.

It is so ordered.



  
A.Y. Mwenda

**Judge**

19.08.2022

Ruling delivered in chamber under the seal of this court in the presence of the Applicant and in the absence of the Respondent.



  
A.Y. Mwenda

**Judge**

19.08.2022