HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB REGISTRY)

AT MOROGORO

LABOUR REVISION NO. 17 OF 2021

(Originating from CMA/MOR/75 and 76/2019, Commission for Mediation and Arbitration, at Morogoro)

THE REGISTERED TRUSTEES

OF THE ADVENTIST CHURCH .....1ST APPLICANT

BOARD OF UFUNUO PUBLISHING HOUSE.....2ND APPLICANT

VERSUS

YONA MSOMI .....1ST RESPONDENT

JOHN CHAGONJA .....2ND RESPONDENT

RULING

2nd May & 25th Oct, 2022

M. J. CHABA, J.

When the Applicant filed this Labour Revision and served the same to the respondents, the respondents filed a Notice of Preliminary Objections (P.O) and raised four points of law as follows: -

1) That, the whole application is incompetent for contravening Rule 24 (2) (e) of the Labour Court Rules GN No. 106 of 2007.
2) That, the whole application is incompetent for contravening Rule 24 (2) (f) of the Labour Court Rules GN No. 106 of 2007.
3) That, the affidavit is fatally defective for failure to identify the deponent contrary to what is provided in the Schedule to the

Oaths and Statutory Declarations Act [Cap. 34 R. E 2009] read together with sections 5 and 10 of the same Act.

4) That, the application is fatally defective for containing grounds of review in affidavit.

At the hearing of the application, the applicant was represented by Mr. Isaac Nassor Tasinga, learned advocate while Messrs. Isaya Zebedayo Mwanri and Baraka Mbwilo, learned advocates appeared for the respondents. On 28/03/2022 both parties agreed to dispose of the raised preliminary objections on points of law by way of written submissions. Both parties complied with courts scheduling order.

Arguing in support of the raised P.O, on the first ground, Mr. Mwanri submitted that the applicant's application does not contain the advice to respondents to file counter affidavit if they wish to oppose the application as rule 24 (2) (e) of the Labour Court Rules GN No. 106/2007 requires, with the rationale of avoiding surprise to the adverse party. He submitted that the applicants contravened the law with ill purpose of surprising the respondents.

In respect of the second ground, he submitted that the counsel for the applicants has kept ignoring the mandatory provisions governing institution of labour disputes. The applicants have not listed the documents intended to be relied on during the hearing of the main case. For that defect, he prayed the court to struck out the application. To reinforce his argument, he cited the case of **Queen Goyayi vs. Cocacola Kwanza Ltd,** Revision No. 02 of 2018.

On the third ground, the learned counsel contended that the affidavit supporting the application was defective for failure of the

attesting officer to identify the deponent. He maintained that such failure makes the jurat defective and the only remedy available is to strike out the application. He cited some precedents, which may conveniently be referred to in the course of determining the P.O, raised.

He proceeded to the fourth ground by contending that the application contains grounds for review instead of revision and the enabling provisions cited by the applicants are for review and not revision. Revision and review have two different reliefs. To him, the applicants contravened rule 24 (3) (d) of the Labour Court Rules, GN. No. 106/2007. For such disobedience, he prayed the court to strike out the application.

In reply, advocate Tasinga submitted on the first point of P.O, that under rule 24 (2) the application is required to substantively comply with the form No. 4. The applicants' application was framed according to form No. 4. According to the learned counsel, Mr. Tasinga, the additional information complained of by the counsel for the respondents is not part of the prescribed form No. 4. If the said requirement was needed by law, its omission however, did not affect the respondents as they managed to present their counter affidavit timely. He invited this court to apply the overriding objective principle to serve justice to the parties.

Addressing the second ground, Mr. Tasinga argued that he attached all relevant documents which are intended to be used during the hearing of the application. He submitted that failure to list the said documents is not fatal and does not prejudice the respondents. He asked this court to focus on substantive justice and not procedural technicalities. He sought support from the case of **Alphonce Dionezio Boniphace vs. Shirika la Upendo na Sadaka,** Labour Revision No.

08 of 2021 where this court overruled the objection on the overriding objective.

As to the third ground which bears the complaint of the attesting officer's failure to identify the deponent, the learned counsel made reference to his copy, which he believed that it contains similar contents as other copies supplied to the respondents and the court. He submitted that upon his examination he failed to spot any defect in the affidavit which the respondents' counsel alleged. He pointed out that Bahati Mabula (Advocate) attested on the affidavit of Mashauri Chiluma the deponent and who was introduced to the attesting officer by Isaac Nassoro Tasinga.

Politely, he submitted that if there would be any such omission in the copies served to the respondents, then the same cannot be fatal to vitiate the application. He referred this court to its precedents of **Theogenes Kato Isherwiga vs. NIC Bank (T) Ltd,** Revision No. 485 of 2019 and **Goldrej Consumers Products Ltd vs. Target International Ltd,** Misc. Comm. Appl. No. 54 of 2019 to buttress his argument.

Facing the fourth ground which states that, the application is fatally defective for containing grounds of review in affidavit, Mr. Tasinga submitted and disqualified the same as containing no pure point of law. He criticized the counsel for the respondents for not citing any law contravened and failure to point out the grounds for review. He accentuated that, the learned counsel for the respondents was required to explain clearly the reliefs found in a revision matter and that of review to differentiate the same. He warned the court not to deal with this

allegation on the ground that it may fall into irregularity as the same do not disclose any point of law.

To rejoin, Mr. Mwanri highlighted that the counsel for the applicant did not dispute the defects pointed out, but he is trying to make possible defences to justify his mistake. He added that, Mr. Tasinga was disobedient to the rules which he knows well. He maintained that the overriding objective cannot be applied blindly. Echoing on ground four, Mr. Mwanri contended that the applicants cited section 91 of the Employment and Labour Relations Act and rule 28 of the Labour Court Rules GN. 106 of 2007, which according to his interpretation, they provide for application for review and not revision. Mr. Mwanri exhibited his belief that, if this court will entertain the application, it will be dealing with the review in this application for revision, while the two are not used interchangeably.

Having outlined the arguments from both sides, I will conveniently deal with the first and second ground jointly. At first, I accept the argument advanced by Mr. Mwanri that the law requires the applicants to file the list of documents to be relied upon during the hearing. This is also a common practice in labour applications. Similarly, on failure by the applicants to include an advice to file counter affidavit, all these are legal requirements. Rule 24 (1) (2) of GN. No. 106 of 2007 provides that:

> *"24.- (1) Any application shall be made on notice to all persons who have an interest in the application.*
> *(2) The notice of application shall substantially comply with Form No. 4 in the Schedule to these Rules, signed by the party bringing*

the application and filed and shall contain the following information: -

(a) – (d) N.A

(e) a notice advising the other party that if he intends to oppose the matter, that party shall deliver a counter affidavit within fifteen days alter the application has been served, failure of which the matter may proceed ex-parte; and

(f) a list and attachment of the documents that are-material and relevant to the application."

In this application, the notice has no list of documents but the documents themselves are attached. The applicants failed to advise the respondents to file counter affidavit if they would wish to challenge the application, this is a clear omission. The counsel for the applicants went astray in interpreting rule 24 above, the same does not just state that application should follow form No. 4, it further provides all the contents therein, including advice to the other party that if he intends to oppose the matter, that party shall deliver a counter affidavit and that it must have the list of material documents to be relied upon. I accept in substance, what Mr. Mwanri tried to point out before the court. Such omission clearly contravened the provisions of the law.

As regard to the effect and remedy, while the counsel for the respondents requests the court to find these omissions as fatal, on the other side the counsel for the applicants is requesting the court to find that the omissions not fatal as the same can be cured by the overriding objective. As observed above, no doubt that the applicants contravened the relevant legal requirements as noted in grounds one and two.

However, upon considered and carefully read the provision of rule 24 of the Labour Court Rules GN No. 106/2007, this court is of the strong position that the spirit of the law intended to notify the adverse party and the court concerning the gist of the application in court and the intended exhibit(s) and evidence to be relied upon. If that is the reason, then I think in my view that attachment of the said documents suffices to satisfy the law. The need to advise the other party that he should file counter affidavit, was as well, redundant upon the respondents filed their counter affidavit timely. On this facet, I am alive that in cases of **Humphrey Ngalawa vs. Coca Cola Kwanza Ltd,** Labour Revision 18 of 2017 and **Paradise Business College vs. Ruth F. Samila,** Labour Revision No. 9 of 2019**,** this court did strike out the applications for contravening rule 24 (2) (e) and (f) of GN 106 of 2007.

Yet in another case of **William Benedictor vs. Platnum Credit Limited,** Labour Revision No. 34 of 2019 when the list of documents was not included in the application, this court observed that: -

> *"This court after a reference and consideration of the provision which provides for the requirement of Rule 24 of the Labour Court Rules GN 106/2007, intend to notify the other party and the court the gist of the application in court and the intended exhibit and evidence to be relied upon. If that is reason and intent for which a notice is required, I find the attachment of the said document suffices to mean that the proper notice went to the court and other party."*

Considering that in this case no prejudice was occasioned against the respondents for non listing of the documents and in the same vein, failure to advise the adverse party to file counter affidavit appears to be

immaterial as the respondents filed a counter affidavit, I am much persuaded by the decision of **William Benedictor** which I see safe to follow the principle developed. Therefore, the omission under grounds one and two of the P.O are sterile.

With regard to the third ground of preliminary objection which is founded on the complaint that the jurat was defective on account that the attesting officer failed to identify the deponent, I am of the strong opinion that the same is misconceived either for failure of the learned counsel for respondents to examine the pleadings properly or for a fault on the side of the counsel for the applicants serving the adverse party incomplete copies of pleadings. However, the copy in the court file does not reflect such omission. The relevant part of a copy of an affidavit filed in court appears this way: -

> *"SWORN at MOROGORO by the said MSHAURI CHIRUMA who is introduced to me by ISAAC NASSOR TASINGWA, the latter being known to me personally in my presence this 4th day of October, 2021."*

Advocate Bahati Mabula attested and stamped therein while also the said deponent signed. I do not think there would be any necessity of revisiting the two sections 5 and 10 of the Oaths and Statutory Declarations Act [Cap. 34 R. E 2019]. Also, the argument that Mr. Tasinga, being an advocate for the applicants was disqualified from introducing the deponent to the attesting officer, advocate Bahati Mabula, it appears to be a new jurisprudence which I have not been aware of. So unfortunate the learned advocate for the respondents did not refer this court to any law. I will dismiss this ground of preliminary objection for having no merit.

To add, had it been correct that the attesting officer failed to state on how he came to know the deponent or as to who identified the deponent before him, the law is settled that the affidavit would not be defective. In the case of **Beatrice Mbilinyi vs. Ahmed Mabkhut Shabiby,** Civil Appeal No. 475/01 of 2020, CAT at Dsm, the Court had an opportunity to handle a similar issue in respect of the attesting officer identifying the deponent. The Court held: -

> *"It is our considered view that since the attesting officer did not indicate that the deponent was introduced to him by someone else, it means that he knew her personally."*

Facing the last ground, the respondents complained that the grounds and reliefs and the enabling provision cited by the applicants are those for review and therefore this application is fatally defective. Mr. Tasinga argued that this ground of objection is incompetent. I fully accept that to tell if the grounds are fit for revision or not is a question of fact, and cannot be dealt with at this stage. Otherwise, section 91 of The Employment and Labour Relations Act [Cap. 366 R.E. 2019] in my interpretation, has nothing exclusive on review. Owing to the counsel for the respondents' persistence to the PO., it is necessary to quote the provision in *extenso:* -

> *"Section 91 (1) - Any party to an arbitration award made under section 88 (10) who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for a decision to set aside the arbitration award:*
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> -

(a) within six weeks of the date that the award was served on the applicant unless the alleged defect involves improper procurement;

(b) if the alleged defect involves improper procurement, within six weeks of the date that the applicant discovers that fact.

(2) The Labour Court may set aside an arbitration award made under this Act on grounds that: -

(a) there was a misconduct on the part of the arbitrator;

(b) the award was improperly procured;

(c) the award is unlawful, illogical or irrational.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) Where the award is set aside, the Labour Court may-

(a) determine the dispute in the manner it considers appropriate;

(b) make any order it considers appropriate about the procedures to be followed to determine the dispute."

What Rule 24 (3) (d) of the the Labour Court Rules GN No. 106/2007 provide is that, the application must include reliefs among others. On scrutiny of the application, I see a number of reliefs contained therein. This court has failed to see what the counsel for the respondents meant by raising this complaint. It is known that this court cannot have any powers of review at revision stage but the CMA itself. The sections cited above, grounds and reliefs sought by the applicants have nothing extra ordinary. Having found that this ground has no merit, it is hereby overruled.

As observed above, grounds one and two are answered in affirmative, but the defect so detected does not go to the root of the case and affect the competency of the application. Grounds three and four are overruled altogether. Nevertheless, I understand that even if these grounds would have been found positive, yet in the circumstance of this case are impotent to dispose of the matter. The parameters in the old case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributor Ltd, (1969) EA 696** would not be met and sections 3A and 3B of The Civil Procedure Code [Cap. 33 R. E 2019] is vital to kick the ball rolling.

In the upshot, and to the extent of my findings, the raised preliminary objections on points of law are substantively not merited, save for the findings on the first and second grounds. Thus, the preliminary objections are overruled. The application to proceed on merit. **I so order.**

DATED at **MOROGORO** this 25th day of October, 2022.

M. J. CHABA

JUDGE

25/10/2022