IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MIS. CIVIL APPLICATION NO. 02 OF 2022

(Originating from Labour Dispute No. CMA/RUV/SONG/28/2022 Commission for Mediation and Arbitration of Ruvuma (CMA))

SALEH NJOVU ..... APPLICANT

VERSUS

D. LIGHT (TZ) LIMITED ..... RESPONDENT

RULING

Date of last Order: *08/09/2022*
Date of Judgement: *20/10/2022*

MLYAMBINA, J.

By way of revision, the Applicant Saleh Njovu has preferred this application supported with his affidavit to challenge the decision of the Commission for Mediation and Arbitration of Ruvuma at Songea (henceforth CMA). The application was made under *section 91(1) (a), 91 (2) (b) and 94 (1) (b) (i), of the Employment and Labour Relation Act No. 6 of 2004, Rule 28 (1) (a), (b), (c), (d) and (e) of the Labour Court Rules, G. N. No. 106 of 2007.*

Prior hearing the application on merits, Counsel Juliana Japhet Mono for the Respondent filed counter affidavit accompanied by notice of preliminary objection on the following points: *First*, the matter is

premature. *Second*, the affidavit in support of the Applicant's application is incurably defective. *Third*, the application is incurably defective for contravening with *Regulation 34 (1) of the Employment and Labour Relations (General) G. N. No. 47 of 2017. Fourth*, the application is incompetent for contravening *Rule 7(1) (a) (b) of the Labour Institution (Mediation and Arbitration Guidelines) GN 67 of 2004 Revised Edition 2019.* Wherefore, the Respondent prayed that the Court be pleased to dismiss the Applicant's Application with costs and grant any other relief(s) as it deems fit.

By consent of the parties, the points of preliminary objection were argued by way of written submission. As regards the first point, the Respondent through its Counsel Juliana Japhet Mono asserted that the application is pre mature. To bolster up the point, the Respondent referred this Court to the provision of *section 30 (1) of the Labour Institutions (Mediation and Arbitration) Rules G. N. No. 64 of 2007* and *section 87 (5) (a) and (b) of the Employment and Labour Relation Act [Cap 366 Revised Edition 2019].*

Counsel Juliana reminded this Court on the requirement of the law for a party who is seeking to challenge the basis of the *ex parte* award. Such party must file an application in a described manner to the CMA and satisfy if there were a good ground for his failure to attend the hearing.

She buttressed her arguments with the case of **Beatrice Masatu v. African Risk Management Service**, Revision No. 349 of 2020, Labour Revision at Dar es Salaam, in which it was held that:

> It is an established principle that for the matter to be restored, the Applicant must show good cause for non-appearance.

Counsel Juliana insisted that the Applicant was supposed to file the application to CMA instead of this Court. If the application could have been dismissed by the CMA, then the Applicant could have appealed to this Court. She maintained that this Court lacks jurisdiction to entertain the case. To back up her argument, she cited the case of **Barclays Bank Tanzania Limited v. Zuhura Mohamed Lyimo**, Misc. Application No. 29 of 2015, High Court of Tanzania, Labour Division at Dar es Salaam.

On the second point, Counsel Juliana asserted that the affidavit in support of the application is incurably defective. The Applicant affirmed at the beginning and sworn at the attestation clause. Further, in the attestation clause, the Applicant failed to indicate the name of the attestator. It was the Respondent submission that the attestation clause should have clearly stated who is verifying and should have been written in accordance with the form prescribed in the schedule made under the provision of section 10 of the *Oath and Statutory Declaration Act [Cap 34*

Revised Edition 2019] which requires; where under any law for the time being in force any person who is required or entitled to make a statutory declaration, the declaration shall be in the form prescribed in the schedule to this Act.

Moreso, Counsel Juliana added that; the jurat of attestation and verification clause are part and parcel of the affidavit. Thus, non-compliance to the same renders the affidavit defective hence the application is incompetent and bad in law. He cited the case of **ZTE Corporation v. Benson Information Limited t/a Smart**, Commercial Case No. 188 of 2017.

The third point of objection was that the application is incurably defective for contravening *regulation 34 (1) of the Employment and Labour Relations (General) Regulation GN No, 47 of 2017.* It was the submission of Counsel Juliana that *regulation 34 (1) (supra)* requires a party who wants to make an application for revision to file the mandatory Notice of intention to seek revision CMA as required. Failure to do so the application becomes incompetent. She cited the cases of: **Unilever Tea Tanzania Limited v. Paul Basondole,** Labour Revision No. 14 of 2020, **Arafat Benjamini Mbilikila v. Nmb Bank Plc**, Revision No. 438 of 2020, High Court of Tanzania at Dar es Salaam (both unreported); **Frank Msingia and 14 Others v. Tanganyika Wilderness Camps Limited,**

Labour Revision No. 49 of 2021, High Court of Tanzania at Arusha. In the latter case it was stated that:

> ...filing of notice seeking revision application is mandatory requirement under *regulation 34 (1) of the Employment and Labour Regulations (General) Regulation GN No. 47 of 2017*. Failure to file the notice makes the revision application incompetent. Hence the remedy available for the above defect is to strike out the application for being incompetently filed before this Court.

On the fourth point, Counsel Juliana submitted that; the application is incompetent for contravening *Rule 7 (1) (a) (b) of the Labour Institution (Mediation and Arbitration guideline) GN No. 67 of 2007 Revised Edition 2019* which provides *inter alia* that:

> A part to a dispute may be represented by- (a) a member or an official of that party's trade union or employers' association; or (b) an Advocate

Based on the afore *Rule 7 (1) (a) (b) (supra)*, it was argued by Counsel Juliana that the Applicant herein through his notice of representation is being represented by one Charz Juma Omary, who is neither advocate nor a member or an official of a party's trade union or employees' association. She added that the above-mentioned representative of the Applicant is working at the CMA at Ruvuma, Songea

Registry as a Registry Officer. He is the one who handled and received all the documents filed before the CMA including Labour Case No. CMA/RUV/SON/28/2022. The present application originated from the aforementioned case hence Charz Juma Omary has conflict of interest and lacks *locus standi* as a representative in this application and should recuse himself for the interest of justice. He prayed to Court to dismiss the application with cost.

In reply, the Applicant conceded to the Respondent points of preliminary objection. He further prayed be given another chance so that he can rectify his mistakes.

After careful consideration of the raised objection, I should register my shock on the last point of objection. It is out of imagination and ethical concerns for an employee of the CMA to turn as a bush lawyer or legal representative of one of the parties who served them during trial. Such act, if entertained can lower reputation of the CMA. It is unethical point of high degree which must be condemned at all levels. As a civil servant in the temple of justice (CMA), the Applicant's representative looses locus of representing any party before the same CMA or any competent Court on either payment basis or forma pauperis.

The Court has further noted that all the raised preliminary objection are pure point of law as it was stated in the case of **Karata Ernest and Others v. the Attorney General,** Civil Revision No. 10 of 2010, Court of Appeal of Tanzania at Dar es Salaam (unreported), **Mbonipa Kasase v. Tanzania Revenue Authority,** Revision No. 422 of 2016, High Court of Tanzania, Labour Division at Dar es Salaam (both unreported), and the case of **Hezron M. Nyachiya v. Tanzania Union of Industrial and Commercial Workers and Another**, Civil Appeal No. 79 of 2001, Court of Appeal of Tanzania at Da es Salaam where the Court quoted with approval the landmark case of **Mukisa Biscuits Manufacturing Co. Limited v. West End Distributors Limited** (1969) E. A. C. A. 696 to mention the view. In the **case of Mukisa** *(supra)* the Court has this to say on the meaning of preliminary objection:

> so far as I am aware, a preliminary objection is in the nature of what used to be a demurrer. It raises pure point of law which when is argued on the assumption that all facts pleaded by other side are correct. If cannot be raised if any fact has to be ascertained or if what is south is exercise of judicial discretion.

To start with the first limb. As extensively observed by this Court in the case of **Benjamini A Nkwera v. Hubert A. Wayotile**, Misc. Land Appeal No. 10 of 2020, High Court of Tanzania, Iringa District registry at

Iringa (unreported), there are two conflicting decisions enunciated by the Court of records on the remedy against ex-parte Judgement. The first school of thought maintains that a party cannot appeal or file revision against an ex-parte Judgement, summary or default Judgement without applying for setting aside before the trial Court. The second school of thought maintains that an ex-parte decision is appealable but there are cannot be two actions at the same time, one action challenging it to the Court of Appeal and another action moving the trial Court to set aside such decision. However, on labour matters, the application for setting aside the ex-parte decision has to be lodged before the CMA in terms of *section 87 (5) (a) of the Employment and Labour Relation Act (supra).* Therefore, as correctly argued by the Respondent, this application was filed pre maturely. The Applicant ought to have exhausted the remedy of setting aside the ex-parte decision before the CMA.

As regards the second limb, the Respondent argued that the affidavit is defective on the ground that the Applicant testified in different two capacities; first, as a Muslim and second as Christian. I find such point to be weak because affirming and testifying are both referring to oath. However, I agree with the Counsel for the Respondent that in terms of *section 10 of the Oath and Statutory Declaration Act (supra)*the

declaration has to bear a name of the attestator. Therefore, the second limb has merit too.

On the third point, the law requires a party who wants to make an application for revision to file the mandatory notice of intention to seek revision. But from the record the Applicant did not do so, consequently, the Applicant application has to be struck out for being incompetence. The same position was reached in the case of **Frank Msingia and 14 Others v. Tanganyika Wilderness Camps Ltd,** Labour Revision No. 49 of 2021. (supra) in which the Court has this to say:

> ...filing a notice to seek revision application is mandatory requirement under *regulation 34 (1) of the Employment and Labour Relation (general) (supra)*... failure to comply with the provision the application has to be struck out for being incompetent.

Indeed, notice is a procedural requirement which must be complied at a mandatory tone. It cannot even be regarded as technical requirement. In the case of **Uniliver Tea Tanzania Limited v. Paul Basondole**, *Labour Revision No 14 of 2020*, High Court of Tanzania at Iringa (unreported) this Court held *inter alia* that:

> *The Court worth of its meaning cannot ignore the laid down legal procedure of filing notice of revision on the*

pretext of avoiding technicalities, for doing so would be violating the law.

As raised by the Respondent and conceded by the Applicant, *Regulation 34 (1) of the Employment and Labour Relations (General Regulation), G. N No. 47 of 2017* requires at a mandatory tone a person intending to seek revision before the Court to file CMA F10 and serve the adverse party before lodging the application for revision. Such notice is in a prescribed form provided at the *third schedule of G.N. No. 47 of 2017* (*supra*). It is such notice which commences the whole process of application for revision.

It therefore fallows that non compliance with the requirement of *Regulation 34 (1) of the Employment and Labour Relations (General Regulations), G.N. No. 47 of 2017* renders the application incompetent.

On the last limb of preliminary objection, as rightly as conceded by the parties and as stated earlier, one Charz Juma Omary is neither a member or an official of the Applicant's trade union nor employers' association or an Advocate. Therefore, he did not qualify to be an Applicant representative in terms of *Rule 7(1) (a) of the Labour Institutions (Mediation and Arbitrator Guidelines (supra).*

In the end result, all the preliminary points of objection are sustained. Consequently, the application is struck out of the Court for been incompetent. No order as to cost.

It is so ordered.

Y. J. MLYAMBINA

JUDGE

20/10/2022

Ruling delivered and dated 20th October, 2022 in the absence of the Applicant and in the presence of learned Counsel Juliana Japhet Mono for the Respondent.

Y. J. MLYAMBINA

JUDGE

20/10/2022