

IN THE HIGH COURT OF TANZANIA
(LABOUR COURT DIVISION)
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA

LABOUR REVISION NO. 08 OF 2022

FINCA MICROFINANCE BANK.....APPLICANT

VERSUS

JALALA HUSSEIN.....RESPONDENT

(From Award of the Commission for Mediation and Arbitration - Dodoma)

(J.R. Katto - Arbitrator)

Dated 06th May, 2022

In

Labour Dispute No. RF.CMA/DOM/81/2021


RULING

09th & 30th September, 2022

MDEMU, J:.

This ruling is in respect of preliminary objections raised by the Respondent herein against the Applicant's application for revision of the decision of the Commission for Mediation and Arbitration (the CMA) in Labour Dispute No. CMA/DOM/81/2021. The notice of preliminary objection is to the effect that:-

1



- 1. This application for revision is incompetent for being supported by a defective affidavit on the part of verification.*
- 2. This application for revision is bad in law for being supported by a defective affidavit on the part of jurat of attestation as it has failed to address whether the deponent was known or introduced to the commissioner for oaths.*
- 3. This application for revision is bad in law for being accompanied by a defective notice of representation.*

On 01st August, 2022, It was ordered that the preliminary objections be heard by way of written submissions. Ms. Yusta Peter Kibuga learned Advocate represented the Applicant whereas Mr. Ramadhan S. Wakulichombe (Respondent's personal representative) represented the Respondent. Both parties complied with the Court scheduling order in filing their submissions.

Mr. Ramadhani S. Wakulichombe arguing in support of the 1st preliminary objection submitted on the first point of preliminary objection that, the affidavit in support of the application on the part of verification is defective since it does not specify the source of the

Respondent's knowledge. He said that, what has been stated from paragraphs 7-12 can't be from the deponent's personal knowledge. These paragraphs are on charges against the Respondent and disciplinary hearing prepared by one Prudence Kamanzi. In disciplinary hearing meeting and the outcomes of the same, the deponent was not present. The Respondent after being terminated was advised to appeal, the advice which he followed but appeal was dismissed and he was terminated from work and paid his terminal benefits. In all these processes, the deponent was not involved, hence, these facts cannot be from deponent's knowledge. He also disputed the fact that, since the Applicant was represented by her Advocate one Yusta Kibuga at CMA, the facts on unfair termination, irregularities committed by Arbitrator, legal issues and reliefs sought cannot be from the deponent's own knowledge.

Regarding this defects on verification clause, the case of **Anatol Peter Rwebangire vs. The Principal Secretary, Ministry of Defence and National Service and Another, Civil Application No. 548/04 of 2018** (unreported) was cited to that effect.

He submitted on the second preliminary objection that, the jurat of attestation in the deponent affidavit is defective as it doesn't tell

whether the deponent was known or introduced to the commissioner for oaths. In his view, this offended the provisions of section 5 of the Oaths and Statutory Declarations Act, Cap. 34. Its effect is to make affidavit defective as was in the case of **Ramadhani Pazi & Wambura Malima vs. Tanzania Civil Aviation Authority, Labour Revision No. 325/2013** (unreported).

Regarding the third point of preliminary objection he argued that, a notice of representation accompanying this application is defective in the sense that it was supposed to name specific names of the Advocate appointed to represent the Applicant and not merely stating that it will be represented by Advocates from Leo Attorneys. He said this is contrary to section 56 of the Labour Institutions Act, Cap. 300 and Rule 43 (1) (a) and (b) of the Labour Court Rules of 2007 GN No. 106/2007.

In reply Ms. Yusta Kibuga submitted on the first preliminary objection that, verification clause is not defective since all facts stated in the affidavit are known to the deponent. She said that, the deponent being an Advocate and head of legal department is aware of all the proceedings involving the employees. She said therefore, the fact that the disciplinary proceedings were prepared by Prudence

Kamanzi and the fact that she was not part of the disciplinary committee does not make the deponent unaware of the facts.

She also stated that, Advocate Yusta who represented the Applicant at CMA was given instructions by the deponent after the dispute was referred to CMA by the Respondent. Regarding irregularities committed by the Arbitrator and legal issues, it was his view that, the deponent being an Advocate does not need to information from another on legal issues, therefore she has knowledge of those facts.

She argued that, according to the case of **Anatoly Peter Rwebangila** (supra) cited by the Respondent, the deponent is required to specify paragraphs which are true to his knowledge or belief which has been done by the deponent. It was her further views that, it needs evidence to prove whether the deponent had knowledge of those facts or not and therefore does not qualify to be a point of objection as per the case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd [1969] EA 696.**

Regarding the second point of objection; the defect that commissioner for oath didn't indicate whether he knew the deponent or was introduced to him by other person is curable as it does not go

to the root of the subject matter. He urged the Court to invoke overriding objective principle and allow the Applicant to amend the affidavit. She cited the case of **Bwanaheri Masawa vs. Ulamu Wisaka, Misc. Land Application No. 55 of 2020** (unreported). She also cited the case of **Ramadhani Pazi & Wambura Malimi** (supra) as not binding and therefore he insisted that, they be allowed to amend the affidavit.

On the third point of objection, she submitted that, the notice of representation was filed under Rule 43 (1) (a) and (b) of GN No. 106 of 2007 though particulars of Rule 43(1) (a) was mistakenly omitted. She said that, the defect is minor which does not go to the root of the subject matter or rights of the parties thus can be cured through amendment. Mr. Ramadhani rejoined briefly and his rejoinder will be referred in the course of analysis. It will not therefore be reproduced here.

Having considered parties submissions, affidavit, counter affidavit and the entire record, the issue before me is whether the raised preliminary objections on defects in the affidavit and notice of representation have merits.

Starting with the first point of preliminary objection on defect in verification clause; in the case of **Director of Public Prosecution vs. Dodoli Kapufi and Patson Tusalile, Criminal Application No. 11 of 2008** (unreported), the verification clause was defined as:-

".....that part of an affidavit which shows the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs."

The rationale of verifying an affidavit was stated by the Court of Appeal in **Lisa E. Peter vs. Al-Hushoom Investment, Civil Application No. 147 of 2016** (unreported) where the Court quoted with approval the Indian Case of **A.K.K. Namibiar vs. Union of India (1970) 35 CR, 121** as follows:

"The reason for verification of affidavits is to enable the Court to find out which facts can be said to be proved on the affidavit evidence or rival parties' allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for allegations. In essence, verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification clause, affidavits cannot be admitted as evidence".

From the cited cases above, verification clause is one of the essential ingredients of any valid affidavit which must show the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs.

Reverting to the application at hand, the Respondent claims that the affidavit of the Applicant is defective for want of proper verification in the following ways: **One** statements contained in paragraph 7 are not from the deponent's personal knowledge rather from one Prudence Kamanzi. **Two**, statements contained in paragraphs 8,9,10 and 11 are about disciplinary hearing meeting, its outcome and mitigation by Respondent. **Three**, Paragraphs 13, 14 and 15 are on Respondent's being advised to appeal against the decision of disciplinary committee, his termination and terminal benefits. **Four**, paragraphs 16 up to 21 are about proceedings conducted at CMA where the Applicant was represented by his Advocate one Yusta Kibuga. In all the four points, the Deponent was not involved.

As pointed earlier, it is a settled position of the law that, an affidavit must base on deponent's personal knowledge and if it is based on other sources, then the source should be disclosed. Furthermore, the deponent must specify which facts are based on

personal knowledge, which are on information and finally on belief. Failure to disclose the source of information renders an affidavit defective.

As I went through the affidavit, apart from the deponent stating that he is a principal officer for the Applicant, head of legal department and company secretary, he didn't depose anything about his participation in the disciplinary committee which its decision led to the termination of employment of the Respondent. Looking at the records, he didn't participate at all in that committee. Therefore, I subscribe the submissions of the Respondent that, the information about the proceedings and outcomes of the disciplinary committee is not Deponent's knowledge rather he was told by the members who attended the same. Likewise, the post information about termination and its outcomes is also not from Deponents knowledge. He was therefore required to acknowledge the sources of such information in verification clauses.

Furthermore, facts that the deponent didn't represent the Applicant at CMA and the information as to what transpired there, was given either by Ms. Yusta who represented the Applicant or by reading

the CMA's file. Therefore he was to state clearly how it came to his knowledge.

In the case of **Tanzania Breweries Limited vs. Herman Bildad Minja, Civil Application No. 11/18 of 2019** which referred the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd vs. The Laws and Advances Realization Trust (LART), Civil Application No. 80 of 2002** (unreported) the Court said:-

"An advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings".

Therefore, in the case at hand, Advocate Yusta who appeared in CMA representing the Applicant was in better position to swear an affidavit as to what transpired at CMA. That said, in respect to the first point of preliminary objection, I find the verification to be defective. Therefore, this point of objection is sustained.

On the second point of preliminary objection, after perusal to the affidavit of the Applicant, the Court have found that, the jurat of attestation in Applicant's affidavit does not indicate whether the

commissioner for oaths knew the deponent personally or got introduced to him by a person known to that commissioner. The Applicant conceded to that defect. That being the case, the said affidavit is defective for violating the provisions of section 8 of the Notaries Public and Commissioner for oaths Act, Cap. 12 which provides that:-

"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act, shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made".

Furthermore, section 10 of the Oaths and Statutory Declarations Act, Cap. 34 provides that, attestation clause must show if the deponent was known to the attesting officer. This requirement must be fully complied. In the application at hand, it is missing and makes the affidavit defective and incurable as stated in the case of **Ramadhani Pazi & Wambura Malimi** (supra). The Applicant prayed this Court to invoke the principle of overriding objective and order amendment of the affidavit.

It is trite law that, following the coming into effect of the principles of overriding objectives, Courts are called upon to uphold

substantive justice and do away with matters of technicalities. The principle however should not be applied blindly against the mandatory provisions of the procedural law which goes to the foundation of the case. See the case of **District Executive Director, Kilwa District Council vs. Bogeta Engineering Limited, Civil Appeal No. 37 of 2017** (unreported).

In my considered view, the principle of overriding objective requires rules of procedures to be followed including parties to make pleadings according to the law, approach to the Court on the present procedures including how, when and what manner they should prepare their documents, affidavit in this instant application inclusive. In the same stance, there was laxity to the Applicant in complying with the mandatory procedures in the jurat of attestation as required by the law. Therefore, under the premises, the Applicant's affidavit is defective thus this preliminary objection is sustained too.

The above two determined preliminary objections suffices to dispose this application and therefore I will not determine the third one as doing so, in my humble view, will be an academic exercise. Accordingly, the two preliminary objections are sustained and the application is thus struck out for being incompetent. No order as to costs.

It is so ordered.



Gerson J. Mdemu

JUDGE

30/09/2022

DATED at DODOMA this 30th day of September, 2022.



Gerson J. Mdemu

JUDGE

30/09/2022