

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(LABOUR DIVISION)**  
**IN THE DISTRICT REGISTRY OF MUSOMA**  
**AT MUSOMA**  
**LABOUR REVISION No. 23 OF 2021**

*(Arising from the Commission for Mediation and Arbitration for Mara at Musoma in  
Labour Dispute No. CMA/MUS/114/2021)*

**PATRICK SAHANI OJWANG' ----- APPLICANT**

**Versus**

**NORTH MARA GOLD MINE ----- RESPONDENT**

**RULING**

**03.03.2022 & 03.03.2022**

**Mtulya F.H., J.:**

Section 44 (1) of the **Advocates Act** [Cap. 341 R.E. 2019] (the Advocates Act) was subject of contest again today in this court. The parties in the present application for Revision are contesting on: *whether endorsement of documents filed by the parties in suits filed in our courts is necessary to authenticate the documents.* In the instant application, Mr. Patrick Sahani Ojwang' (the applicant) had filed Notice of Application, Chamber Summons and Two Affidavits, one containing six (6) paragraphs and another thirteen (13) paragraphs.

However, all the four (4) documents were not endorsed by the applicant. Today when the application for revision was scheduled for

hearing, the respondent invited Mr. Faustine Malongo, learned counsel, to protest the application at preliminary stages by raising a point of law which states that: *the application is incompetent as the Notice of Application, the Chamber Summons and Affidavits supporting the application have not been endorsed by the applicant contrary to mandatory provision of section 44 (1) of the Advocates Act [Cap. 341 of R.E. 2019].*

Today afternoon, when Mr. Malongo was invited to take the floor of this court and explain his protest, he briefly submitted that the application is incompetent for failure to have signature of the applicant. In order to move the court to decide in favour of the raised point, he cited the decision of the Court of Appeal in **Ashura Abdulkadri v. The Director, Tilapia Hotel**, Civil Application No. 2 of 2005, contending that the court interpreted the word *endorse* to mean *signature of the applicant* and invited section 44 (1) of the Advocate Act and section 53 (2) of the **Interpretation of Laws Act**, [Cap. 1 R.E. 2002] (the Interpretation Act) and finally Mr. Malongo prayed this court to follow the course and strike out the application for want of competence.

This submission was protested by Mr. Elly Amani Ogola, Personal Representative of the applicant, contending that the Advocates Act regulates learned counsels and people who enjoy

legal representation of learned counsels. To his opinion, the present applicant is a lay person who can be exempted from the law and cited precedent of the Court of Appeal so that the substantive justice can be attained.

Finally, Mr. Ogola prayed this court to take note of the applicant's name in the filed documents and consider it as part of the endorsement asked by Mr. Malongo, and in any case, if this court finds merit in the objection it may grant leave in favour of alteration of the document by allowing the applicant to sign the same.

In a brief rejoinder, Mr. Malongo submitted that the aim of endorsement is to authenticate documents brought to the attention of courts and cannot be altered as the documents do not qualify to be proper as per requirement of the law. Mr. Malongo submitted further that the issue of endorsement is not technicality of the law or dedicated to lawyers, but authentication of the documents filed in courts.

According to Mr. Malongo, the Court of Appeal in the case of **Ashura Abdulkadri v. The Director, Tilapia Hotel** (supra) struck out the documents of Ashura Abdulkadri in individual lay person, not a lawyer or enjoyed legal representation whereas in the present

application Mr. Ogola is representing the applicant and must learn points of law.

I have perused the provisions in section 44(1) of the Advocates Act which was enacted by use of the words: *shall endorse or cause to be endorsed there on* and section 53 (2) of the Interpretation of Laws Act which provides that: *where in a written law the word **shall** is used in conferring a function, such word **shall** be interpreted to mean that the function so conferred must be performed.*

I am well aware that the word *shall* imputes imperativeness. However, this court and Court of Appeal in some circumstances have interpreted the word *shall* to indicate flexibility of issues and subject to considerations of other laws (see: **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006 and **Zahara Kitindi & Another v. Juma Swalehe & Nine (9) Other**, Civil Application No. 4/05/ 2017).

However, in my considered opinion, section 44 (1) of the Advocates Act and section 53 (2) of the Interpretation of Laws Act have received interpretation of our superior court in the precedent of **Ashura Abdulkadri v. The Director, Tilapia Hotel** (supra), this court has no any mandate to alter the position even if it has good

reasons to depart. This court cannot be a folk-lift to shift goal posts of already established precedents.

Having said so, I will not be detained on the subject as the applicant's documents are obvious that were not endorsed, or to put it in a plain language, the documents filed by the applicant in this court were not signed. Now, the only question remained for determination is whether after enactment of section 3A and 3B of the **Civil Procedure Code** [Cap. 33 R. E 2019] (the Code), the fault can be rectified and proceed with the hearing? To Mr. Malongo the present application is incompetent and cannot be amended to display proper record, whereas Mr Ogola thinks it can be amended to align with the laws in search of substantive justice of the parties.

I perused decisions of this court and Court of Appeal on the subject and applications like the present one. I detected divergent views on what is the proper course to take. The Court of Appeal is silent after the stuck out order as in the decision of **Ashura Abdulkadri v. The Director, Tilapia Hotel** (*supra*), which was cherished by the decision of this court in **Rocket Mahega v. Msafiri Msigitani Msemba** Misc. Land Application No. 62 of 2020.

However, this court in **Amina Mhonghole v. Medical Stores Department (MSD)**, Labour Revision No. 331 of 2016, took a

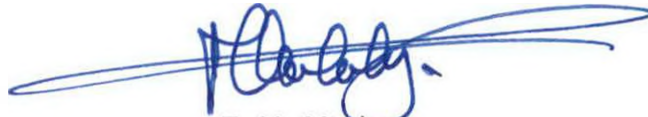
different course. After the struck out order, it went further to grant five (5) days' leave for the respondent to file proper counter affidavit to align with laws regulating labour dispute and affidavits. I think, in search of subtractive justice in the present application, I will align with this decision. Reasons are obvious that the decision of the Court of Appeal was decided before the insertion of section 3A and 3B of the Code and in any case is silent after the struck out order.

This court and Court of Appeal are currently in favour of substantive justice (see: see: **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017, **Gaspar Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017, **Mandorosi Village Council & Others v. Tuzama Breweries Limited & Others**, Civil Appeal No. 66 of 2017 and **Njoka Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017).

Having noted the new practice in favour of substantive justice, and avoiding to be part of grave diggers to the new developments of laws in our country, I have decided to strike out the present application for want of competence. However, I am moved to grant the applicant fourteen (14) days' leave to file fresh and proper application without any further delay, as I hereby do. I

award no costs in the present application as this is a labour dispute and was not determined to its finality in substance.

Ordered accordingly.



F. H. Mtulya

**Judge**

03.03.2022

This Ruling is delivered in Chambers under the seal of this court in the presence of the applicant, Mr. Patrick Sahani Ojwang' and his Personal Representative, Mr. Elly Amani Ogola and in the presence of Mr. Faustine Malongo, learned counsel for the respondent.



F. H. Mtulya

**Judge**

03.03.202