

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT MOROGORO

MISC. LABOUR APPLICATION NO 19 OF 2021

LUKA J. LUWANDA & 22 OTHERS APPLICANTS

VERSUS

SMH RAIL SDN.BHD- MORO RESPONDENT

(Originating from the decision of the Commission for Mediation and Arbitration No.
CMA/MORO/86/2017)

RULING

Date of Last Order: 11/02/2022 &
Date of Judgment: 14/02/2022

S.M. KALUNDE J

This is a ruling in respect of a preliminary objections raised by the respondent against the applicant's application. On the 01st October, 2022 the applicants filed an application with two prayers: **first**, that the Court permits one LUKA J. LUWANDA to appear on behalf of 22 other applicants in prosecuting the application; **second**, the Court be pleased to call for and revise and set aside an award of the Arbitrator Commission for Mediation and Arbitration for Morogoro ("the CMA") in Labour Dispute **CMA/MORO/86/2017**. The application is preferred under section 91 (1) (a), 91 (2) (c) and 94 (1) (b) (i) of **the Employment and Labour Relation Act, Cap. 366 R.E 2019** and Rule 24 (1) (2) (a) (b) (c), (d), (e), (f) 3 (a) (b) (c), (d) 28 (1) (b) (c)

(d) (e) of **the Labour Court Rules, 2007 G.N No 106 of 2007** ("the Labour Rules"), and is being supported by a joint affidavit of the applicants.

On being served the respondent filed a counter affidavit deposed by KAIN PATRICK, a Human Resources Manager of the respondent. Together with the counter affidavit, the respondent filed Notice of Opposition under Rules 21(1), 24(2) (a-f), 24(4) (a & b) of the Labour Rules. The respondent also filed a Notice of Preliminary Objection which raised two preliminary points of objection namely; -

1. That this application is bad in law for being filed contrary to the order of the Court dated 8th August 2021; and

2. That the application is bad in law for being omnibus

Hearing of the preliminary objection was conducted by way of written submissions. Both parties filed their submissions in accordance with the schedules ordered by the Court. **Mr. Nuhu Mkumbukwa** learned advocate prepared the respondents submissions while those of the applicants were prepared and filed by their representative **Mr.**

Boniphace Edward Basesa.



Submitting in support of the first limb of the preliminary objection Mr. Mkumbukwa submitted that the present application contravened the order of the Court dated 02th August, 2021 in which this Court (**Hon. Maghimbi, J.**) ordered the withdrawal of the **Misc. Labour Application No. 31 of 2021** and ordered that the same be refiled by 02nd September, 2021. The counsel added that the present application was bad in law for being filed on 01st October, 2021 almost a month after the limitation issued by, and without leave of, the Court. Mr. Mkumbukwa insisted that courts orders are meant to be respected and complied with. To support his view, he cited the case of **Micky Gilead Ndetura vs Exim Bank (T) Limited**, HC-Commercial Case No. 4 of 2014 at pages 3 & 4 and **Tanzania Breweries Ltd vs Esson Dhobe and 19 Others**, HC-Misc. Civil Application No. 96 of 2000 (all unreported).

On the second point of objection the respondent submitted that, the applicant combined two prayers in a single application, that is: the prayer for representative suit and prayer for revision of the award of the CMA. In his submissions the counsel for the respondents admitted that the law does not bar the joining of two prayers in one application. However, he contended that the applicants cannot ride two horses at the same time. The counsel contended that the provisions guiding the grant

of the respective orders were different, that the time limitations required for filing the respective applications were also different. In addition to that the counsel was of the view that the considerations to be taken into account in determining the respective prayers were also different. The counsel insisted that the application was bad in law for being omnibus. In supporting his argument, he referred to the case of **Juma M. Nkondo vs. TOL Gases Limited/ Tanzania Oxygen Limited & Another** (Civil Application 382 of 2019) [2021] TZCA 372 (12 August 2021 TANZLII); and **Rutagatina C.L. vs Advocate Committee and Another**, Civil Application No. 98 of 2010 (unreported)

In opposing the preliminary objections, the applicants submitted that the present application was filed electronically on 18th August, 2021 within the limitation prescribed by the Court. He said the case was filed through the Judiciary Statistical Dashboard System (JSDS). He added that the case was registered on 21st August, 2021 at around 11:40:47. In his submissions, the applicants appended a copy of a piece of paper showing the application was registered on 21st September, 2021 at around 11:40:47. On the 24th August, 2021 the copy of documents were submitted to court clerks who informed him the Deputy Registrar was not around. In addition to that the applicants insisted that the cited

authorities were not applicable in the present case as he had filed the application through the JSDS. In conclusion the applicants resisted that the objections raised by the respondents were mere technicalities and invited the dismissal of the same in terms of Article 107 A (1) (e) and 13 (6) (a) of **the Constitution of the United Republic of Tanzania, 1977**.

In a brief rejoinder, the respondent submitted that the allegations that the application was filed on time were baseless as the records were clear that the application was received by the Court registry on 01st October, 2021. As for the attached piece of paper showing the application was registered on 21st September, 2021 at around 11:40:47, the respondent argued that the same should not be considered as submissions were not evidence. To support the contention, he cited the case of **Rosemary Stella Chambejairo vs David Kitundu Jairo** (Civil Reference 6 of 2018) [2021] TZCA 442 (02 September 2021 TANZLII).

Responding to allegations that the application was handed over to the court clerk, the respondent argued that without an affidavit of the respective court clerk the applicants' allegations were mere hearsay. The counsel cited the case of **Issack Sebegele vs. Tanzania Portland Cement Co. Ltd**, Civil Application No. 25 of 2002

(unreported) where the court held *inter alia* that to prove the statements of the court clerk the application should have appended an affidavit dully sworn by the respective court registry officer. The counsel for the respondent concluded with a prayer that the application struck out for being incompetent.

I have respectfully considered the records, the parties' affidavits and written submissions made by both parties. My duty now is to consider the merit or otherwise of the objections raised by the preliminary objections raised by the respondent. There is no dispute that prior to the present application, the applicants had lodged **Misc. Labour Application No. 31 of 2021**. It is also apparent from the records that application No. 31 of 2021 was marked as withdrawn on the 02nd-August, 2021. Following the withdrawal of the application the Court made the following order:

*"The application is hereby marked withdrawn
with leave to refile by 02/09/2021.*

Sgd. S.M. Maghimbi, J
02/08/2021"

The counsel for the respondents contended that, in accordance with the order dated 02nd August, 2021, the Court (**Hon. Maghimbi,**

J.) granted the applicants 30 days within which to file their application. He maintained that the deadline for filing the application was the 02nd September, 2021 and hence any application filed thereafter was incompetent for being filed out of time and without leave of the Court. On their part the respondents argued that they filed the application online through JSDS on 18th August, 2021 and the same was registered on 21st August, 2021. Their submissions appended a paper, being evidence of a printout allegedly from JSDS. The applicants argued further that they present a copy of hard-copy to the court clerks on 24th August, 2021 and not 01st October, 2021 as indicated on the application.

Before proceeding to the merits of the application I gather it is worth considering two legal issues raised by the counsel for the respondents. **First**, he contended that a piece of paper showing the application was registered on 21st September, 2021 at around 11:40:47, should not be considered as it was not evidence. He cited the case of **Rosemary Stella Chambejairo vs David Kitundu Jairo** (supra). On this I agree with Mkumbukwa that written submissions, as opposed to affidavits, are not evidence. If the respondents intended to rely on the respective document, they had an option to include it in their response.

in the reply to counter affidavit which they filed, but surprisingly they did not include the said document.

In the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006, CAT at DSM (unreported) cited in **Rosemary Stella Chambejairo vs David Kitundu Jairo** (supra) it was held that:

"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

Relying on the above case, I will not consider the substance of the said document for the same is akin to testimony from the bar, the practice abhorred and discouraged by court, as illustrated in the two cases cited above. As pointed out above the applicant had an opportunity to swear an affidavit in reply to the respondent counter affidavit.



The second point raised by Mr. Mkubukwa related to the allegation that the applicants submitted hard copies of the application to the court clerks on 24th August, 2021 and not 01st October, 2021 as stamped by the court clerks on the application. Mr. Mkumbukwa argued that the respective court clerk ought to have sworn an affidavit on the alleged set of facts. Relying in the case of **Issack Sebegele vs. Tanzania Portland Cement Co. Ltd** (supra), the counsel was of the view that without an affidavit of the respective court clerk the applicants' allegations were mere hearsay. In the above cited case the single justice of the Court of Appeal (**Lubuwa, J.A.**) stated:

"In order to ascertain that that was in fact what happened, the Court requires some evidence in support of the applicant's claim against the Court Registry Officer. First, in the affidavit in support of the application, it was expected of the applicant to indicate in one of the paragraphs that a particular Court Registry Officer was involved in the delay.

This was not done, instead, the applicant simply states in paragraph 6 of the affidavit that he was making follow up of the matter until the application No.2 of 200 was registered. Second, in an effort to prove that the applicant's claim was not without substance, ordinarily, this application should

have been accompanied with the affidavit of the Court Registry officer dully sworn to that effect. This again was not done. So, as said before, it remains a matter of conjecture based on a bare assertion by the applicant..."

The Court went on to rule that there was no proof that the Court Registry Officer was responsible for the delay. In the present case, beside mere assertions by the applicants there is no proof that the applicants submitted the respective application before the court clerk on the alleged date. The argument therefore lack merit.

I will now revert to the merits of the preliminary objection. It is trite that Court orders are meant to be respected and complied with if the administration of justice is to be effective and respected. If court orders are to be disrespected and everyone decide to do what they please there is a likelihood that the system of justice will be rendered useless, and there will be chaos. See **Massati. J** reasoning in **P3525 COL. Idahya Maganga Gregory vs. The Judge Advocate General Court Martial**, Criminal Appeal No. 4 Of 2002. Similarly, it is the duty of the courts to ensure that rules of Court are observed strictly. Equally, court are discouraged from aiding any parties who deliberately commits



lapses. See **Tanzania Harbours Authority vs. Mohamed R. Mohamed** (2002) TLR 76.

In the present case the court ordered the applicant to refile their application by the 02nd September, 2021. However, the records show that the application was received by the Court Registry and marked as filed on 01st October, 2021. That is almost 60 days from the date of the order and 30 days from the deadline allowed by the Court and no leave of the Court was sought or granted. There was also no explanation or any materials to for which the Court would reckon any specific timelines that might have delayed the applicants in lodging their application. What the applicants did was utter disrespect of the lawful orders of the court. The position is that, when the court orders a particular act or acts to be done within a particular period or in a particular manner. That act or acts should be done within the said period or in the manner so prescribed by the Court. If a party is precluded to do something as ordered by the court or if they wish to do it in a different manner as ordered by the court, they should approach the court. A party cannot expect to be told to do one thing and go and do another thing. If this is allowed then there would, truly, be chaos, something that this Court would not allow.

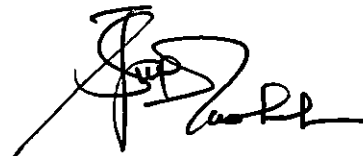
As pointed out above, the applicant had 30 days to file his application. He did not do so; instead, he filed the application 30 days after the deadline had passed and no leave of the Court was sought in filing the application out of time. In the circumstances, what the applicants did was tantamount to filing the application out of time. If the applicants wished to prosecute their applications, they should have applied to the court to enlarge the time for filing the application instead of doing it themselves. The application is therefore incompetent for being logged out of time.

For the forgoing reasons I uphold the first limb of the preliminary objection. In the upshot I find it academic to entertain the second limb of the preliminary objection. That said, I struck out the application.

It is accordingly ordered.

DATED at MOROGORO this 14th day of FEBRUARY, 2022.




S.M. KALUNDE
JUDGE