

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 48 OF 2022

ERIC SHEM GWAJE -----APPLICANT

VERSUS

NMB BANK PLC-----RESPONDENT

RULING

June 14th & July 11th, 2023

Morris, J

Before this court is an application for revision against the decision of Commission for Mediation and Arbitration for Mwanza (CMA). The application, however, does not seem to commence with a smooth take off. It is, to begin with, challenged by a point of preliminary objection (PO) that it is incompetent for having been filed without prior notice.

I ordered parties to argue for and against the PO by filing written submissions. The scheduling order was complied with. The submissions were filed by Messrs. Sabas Shayo and Reagan Charles, learned advocates for the respondent and applicant respectively.



For the respondent it was submitted that a notice of intention to seek Revision (form No. 10) must be filed prior to revision. That the same is a compulsory requirement by regulation 34 (1) of ***the Employment and Labour Relations (General) Regulations***, GN NO. 47 of 2017. To the respondent, the subject section is couched with the word 'shall', which expression, pursuant to section 53 (2) of ***the Interpretation of Laws Act***, Cap 1 R.E. 2019 means mandatory. Further reference was made to the cases of ***Unilever Tea Tanzania Limited v Paul Basondele***, Labour Revision No. 14 of 2020; and ***Arafat Benkamin Mbilikila v NMB Bank PLC***, Revision No. 438 of 2020 (both unreported). He, accordingly, prayed for the application to be dismissed.

In reply, it was submitted by the applicant that whether the notice was filed or not is a matter of evidence. That is, to ascertain if such notice was filed and served to the other party or not, is not capable of being determined without resorting to evidence. Therefore, to the applicant, such matter cannot be raised as point of preliminary objection. I was referred to ***Soitsambu Village Council v Tanzania Breweries Ltd and Another***, Civil Appeal No. 105 of 2011; and ***Serengeti Breweries Limited v Hector***



Sequiraa, Civil Application No. 133 of 2016 (both unreported). Consequently, he prayed for the preliminary objection to be dismissed with costs.

I have objectively considered the above rival submissions of both sides. I am aware of the two schools of thought by this court regarding the subject notice. The first school is of the view that failure to file the notice of intention to seek revision is fatal and cannot be cured by overriding objective principle. [See the case of **Uniliver Tea Tanzania Limited v Paul Basondele**; **Arafat Benkamin Mbilikila v NMB Bank PLC** (*supra*) and the case of **Antony John Kazembe v Inter Testing Services (EA) (PTY) Ltd**, Revision Application No. 391 of 2021; **Unilever Tea Tanzania Limited v Paschalina David**, Labour Revision Application No. 16 of 2020 (both unreported)].

The second school of thought is of the view that failure to file the notice poses no harm. The objective of this school is that the court needs to deal with substantive justice and not be tied up with technicalities. See for instance, the case of **Adam Lengai Masangwa and another v Mount Meru Hotel**, Labor Revision No 1 of 2018. Also, it is backed up by the

argument that evidence is required to prove presence and/or service of such notice [*Alex Situmbura v Mohamed Nawayi*, Revision Application No. 13 of 2021 (unreported)].

I have to consider a number of factors before picking my preference to either of the schools. **One**, the purpose of the said notice is twofold: to alert the opposite party of the intended revision; and to notify the CMA for it to timely prepare necessary documents (record) ready for the subsequent stage. For the first fold, the opposite party should not be taken by surprise. In my profound analysis, this rationale is secondary. The major objective is discussed for the second limb below. In this instant case, the respondent was not taken by surprise for after being served with the application, he filed the requisite counter credentials. Hence, his fate hereof is safely sorted.

Further, regarding the effect of notice to CMA; the phraseology of **CMA F.10** is categorically prayerful that: "Please forward, as expeditiously as possible, certified copies of proceedings and award to the High Court of Tanzania". To me, whether or not the notice exists, the Commission is obliged to prepare its proceedings and other records. More so, timely; as so fast as circumstances may warrant. In other words, it is not the notice which



confers such jurisdiction to CMA. Either way, in the current matter, CMA records were timely relayed to this court. Hence, the major objective of the notice was achieved, its absence notwithstanding.

Two, the respondent is not likely to be prejudiced if the application will be heard on merit in absence of the said notice. The court reckons that the respondent is equally a beneficiary of timely justice. Striking this application out will not bar the applicant, if he will still so wish, from filing the similar matter afresh after obtaining requisite extension of time. Multiplicity of proceedings is not only costly but also time-and-labour intensive. Where possible, parties (perhaps, and the court) should be spared of such superfluous rigour.

Three, with advent of overriding objective, the court should be piloted towards justice rather than being tied with legal technicalities. Further, in terms of section 3 (a) and (f) of ***the Employment and Labour Relations Act***, Cap. 366 R.E. 2019; apart from upholding and promoting constitutional principles (observance of substantive justice inclusive), the prime objective of this law is to perpetuate social justice which enhances economic development.

Four, the cited provision in the PO provides that;

"34. -(1) The forms set out in the Third Schedule to these Regulations shall be used in all matters to which they refer.

(2) The forms made under these Regulations may be modified, adopted or altered by the Minister in expression to suit the purpose for which they were intended."

The Court's reading of the foregoing provision, is that the subject law does not seem to imply that revision will only be initiated by notice. That is, the notice does not initiate the revision stage of the matter. Instead, in my view, the party who wishes to give the notice must use the prescribed form. More so, the prescribed form is subject to ministerial customization to "suit the purpose for which they were intended". In line with my earlier argument, the intention of the notice envisaged here is primarily to request CMA to forward its record to the High Court.

The word "shall" in a statute, with adequate respect to the respondent's counsel, does not necessarily mean compulsiveness. Each and every case needs to be decided on its own peculiarity. I stand guided by



cases of ***Jafari Juma v Republic***, Criminal Appeal No. 254 of 2019; and ***Goodluck Kyando v Republic*** [2006] TLR 363.

On the basis of the above reasoning and analysis, I am inclined to join the second school of thought. The point of preliminary objection, thus, lacks merit and is hereby overruled. I order the matter to proceed accordingly. Each party shall shoulder own costs. It is so ordered.



C.K.K. Morris

Judge

July 11th, 2023

Ruling is delivered this **11th** day of **July 2023** in the presence of Mr. Erick Shem Gwaje, the applicant. The respondent is absent.

C.K.K. Morris

Judge

July 11th, 2023