

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT MUSOMA

LABOUR REVISION NO. 11 OF 2023

*(Arising from the Decision of the Commission for Mediation and Arbitration for Mara
at Musoma in Labour Dispute No. CMA/MAR/MUS/112/2022)*

SIL INTERNATIONAL TANZANIA BRANCH APPLICANT

VERSUS

ELIUD MWAKALASYA RESPONDENT

RULING

24th & 26th July, 2023.

M. L. KOMBA, J.:

Before this revision came for hearing, the respondent filed *plea in limine*
litis that;

- 1. The application is incurably defective for non-compliance with the requirement to file a notice of intention to seek revision as per Regulation 34 (1) of the Employment and Labour Relations (general) Regulations, 2017 GN 47 Published on 24/02/2017.*
- 2. That the application is incurably defective for containing the defective affidavit contrary to section 7 of the Notaries Public and Commissioners for Oaths Act Cap 12 R.E 2019.*

When the matter was called for hearing, the applicant had the legal service of Mr. Allen Mchaki, while Mr. Ernest Mhagama, both learned advocates.

The counsel for respondent's argument on the first objection was that the application is incurably defective for non-complying the requirement of Reg 34(1) of the Employment and Labour Relations (General) Regulation, GN 47 of 2017 that insisting that any person who is aggrieved by the award of Commission for Mediation and Arbitration (CMA) and intend to seek revision to the High Court is required to file a notice to seek revision and the notice has to be served to respondent. It was his submission that the notice can be referred as notice of appeal, something of that nature, as was in the case of **Unilever Tea Tanzania Ltd vs. Paul Basondole** Lab. Rev 14 of 2020 Iringa. The same position was re-iterated in the case of **Swala Solution vs. Ally Salum Nasibu** Lab Rev 01 of 2023 High Court Musoma. He said failure to abide with regulation 34(1) makes the application incompetent.

On the second point of objection, Mr. Mhagama submitted that section 7 of the Notaries Public and Commissioner for Oath Act, Cap 12, does not authorized an advocate as a commissioner for oaths to exercise his powers regarding the oath in any proceedings or matter in which he is

advocate to any of the parties or in which he is interested. He said, if one has client, he cannot exercise the powers regarding the oath and in the application at hand, the counsel for the applicant was not supposed to endorse in the affidavit of his client. Counsel for respondent refer the affidavit of Erick Njumba, the principal officer of the applicant and submitted that it was prepared by Advocate Allen Mchaki and in the jurat of attestation is signed by Allen Mchaki, according to this counsel, this is contrary to S. 7 of Cap 12.

Counsel prayed this court to find both points to have merit and to find the application is incompetent. He prays for the costs too as he is aware that rule 51(2) of Labour Court Rules provides exceptional when the matter is frivolous or vexatious the court may order the costs, be it general or specific incurred by the party. So far as his client has incurred the cost to hire a lawyer, he prays for cost as the matter in this revision is frivolous and pray the matter to be struck out.

On the side of the applicant, Mr. Allen submitted that the matter is properly filed under S. 94(1) and rules 24 and 28 and 35 of Labour Court Rules. According to him these rules are enough to move this court and the sections are relevant. Regarding Reg 34(1) he submitted that the same is not mandatory, it is a form number 10. To boost his

argument, he refers this court to the case of **TRA vs. Mulamuzi Byabusha**, Rev No. 312 of 2021 Labour Division at page 8 where Hon. Judge said there is nowhere in the law where CMA form No. 10 can institute a revision before this court. He protests the form to resemble notice of appeal submitting that not every non-compliance of statutory render the matter incompetent.

On the second point of objection, it was his submission that there is a decision of Mihayo J. in **Amir Abdallah Kilindo vs. Global Security Finance Insurance**, Civil Case No. 220 of 2002. Page 7. He said so far as he is not subjected to cross examination then the affidavit is competent as his duty is to represent a client in court of law. If his representation gives then benefit then he would have to recuse and that it won't be fair to struck out this application because of attestation as per Art 107 A (2) the Constitution that court has been vested with power to make decision but not deal with technicalities. Mr. Allen prayed this court to dismiss the PO and entertain main application.

In rejoinder, Mr. Mhagama insisted that in the first point so far as the issue is the labour matters then from Commission for Mediation and Arbitration up to High Court everything must be in forms. He said that's why the regulation insisted each form shall be used to all matters to

which they refer as in the case of TRA. He pointed out that the word shall is mandatory requirement. He said the case of **Amir Abdallah Kilindo** is distinguishable from the one at hand on the sense that it does not state anything about S. 7 of Cap 12.

I have thoroughly read the submissions by both parties and the pleadings

from which the preliminary objection emanates. Thus, I am now ready to determine the two points of the preliminary objection starting with the second one, about affidavit. Before I start analysis of issues confronted me, I find it necessary to reproduce section 7 of Cap 12 thus;

*'No commissioner for oaths **shall** exercise any of his powers as a commissioner for oaths in any proceedings or matter **in which he is advocate to any of the parties** or in which he is interested.'*

The excerpt above prohibits an advocate to exercise his powers in a case which he is an advocate, that is he is interested. Mr. Allen claimed that he has right to represent his client and that he will not be cross examined and therefore the jurat in applicant's affidavit is right. Mr. Mhagama was of the view that counsel for the applicant was not supposed to endorse in the affidavit of Erick Njumba, his client. I agree with respondent that Mr. Allen as an advocate has interest in the affidavit of Erick Njumba, as he has interest in said affidavit as he is the

counsel for the deponent. I find this is violation of section 7 of Cap 12 as it is coached in mandatory terms.

Once affidavit is termed to contain defects, it renders the entire application incompetent as it has no leg to stand on. The only remedy for that is to strike out and that has been the position in this court and find no necessity to depart from that. See **Thadei Paul Komu & 2 Others vs. Michael Paul Komu** (Misc. Civil Application 519 of 2017) [2018] TZHC 49 and **Heribo Samweli & Another vs. The Republic**, Criminal Application No. 4 of 2010 CAT at Mbeya.

The case of **Amir Abdallah Kilindo** is distinguishable from the one at hand as in **Amir Abdallah**, the counsel in that case testified a contract between the parties, it was not anticipated that the contract will be subject of a suit in court of law and the plaintiff was not his client at the time he attests the contract. In the case at hand, affidavit is party of chamber summons which initiate this revision and therefore, the advocate prepared the said affidavit knowing he is providing legal service to the deponent and he is representing him to this court. Mr. Allen relied in Article 107A of the Constitution claiming that this court should not be tied up with technicalities. I agree with the cited article and the content but issues in this case does not fit in technicalities as

this court cannot act blindly where the provisions of the law clearly stipulate requirements and or conditions. That was not the intention of the Parliament.

It is my findings that affidavit in support of the application before me is incurably defective. This point alone suffices to dispose of the matter and it is not health to dwell on discussing the remaining ground of objection.

In the event and for foregoing reasons, I hereby uphold the 2nd point of objection and proceed to declare that, Labour Revision No. 11 of 2023 which is accompanied by defective affidavit is incompetent and is hereby struck out with costs.




M. L. KOMBA

Judge

26 July, 2023

Ruling delivered in court before Hami Magere, representative of the applicant and in the absence of the respondent.


M. L. KOMBA

Judge

26 July, 2023